Supreme Court, U.S.
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90-1352

No. _____

In The

Supreme Court of the United States

October Term, 1990

MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS (MABA), *et al.*

Appellants,

v.

THE STATE OF TEXAS, *et al.*

Appellees.

On Appeal From The United States District Court For The Western District Of Texas

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Did the district court err in characterizing submitted supplemental material as "not material" and therefore "precleared by operation of law" certain voting changes even though the United States Attorney General had found those changes objectionable under Section 5 of the Voting Rights Act.

2. Is preclearance required of certain voting procedures that were enacted by state statute prior to the effective date of Section 5 of the Voting Rights Act but that were first applied after the effective date of the Act and that the United States Attorney General opined should be precleared.

PARTIES

The parties in the court below are as follows:

Plaintiffs: The Mexican American Bar Association (MABA), The League of United Latin American Citizens (LULAC), LULAC Council #4434, LULAC Council #4451, Christina Moreno, Aquilla Watson, Joan Ervin, Matthew W. Plummer Sr., Jim Conley, Volma Overton, Willard Pen Conat, Gene Colins, Al Price, Theodore M. Hogrobrooks, Ernest M. Deckard, Mary Ellen Hicks, and Rev. James Thomas.

Defendants: The State of Texas, The Attorney General of the State of Texas, and The Secretary of State for the State of Texas.

Defendant Intervenors: Faith Johnson, Jerry Dellana, Paul R. Davis, Pete Perez, and William E. Burdock.

The plaintiffs in the court below are appellants in this Court. The defendants and defendant-intervenors in the court below are appellees in this Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

STATUTE INVOLVED 3

STATEMENT OF THE CASE 3

THE QUESTIONS ARE SUBSTANTIAL 8

I. THE DISTRICT COURT ERRED IN DETERMINING THAT SUPPLEMENTAL INFORMATION SUPPLIED BY THE STATE OF TEXAS PURSUANT TO ITS SUBMISSION OF S.B. 1379 WAS NOT MATERIAL 9

II. NEWLY CREATED ELECTED POSITIONS WHOSE FIRST ELECTION OCCURRED AFTER NOVEMBER 1, 1972, MUST BE PRECLEARED BY THE ATTORNEY GENERAL PURSUANT TO SECTION 5 OF THE VOTING RIGHTS ACT 14

III. THIS COURT SHOULD REINSTATE THE ATTORNEY GENERAL'S LETTER OF OBJECTION, ORDER THAT ELECTIONS HELD PURSUANT TO S.B. 1379 BE SET ASIDE, ORDER THE SUBMISSION OF S.B. 515 TO THE ATTORNEY GENERAL FOR PRECLEARANCE AND REMAND THE CASE TO THE DISTRICT COURT FOR FURTHER RELIEF THAT MAY BE NECESSARY 16

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, 477 U.S. 242 (1986) 7

Blanding v. Dubose, 454 U.S. 393 (1982) 9, 11, 12

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) 13

City of Lockhart v. United States, 460 U.S. 125 (1983) ..8, 15

Connor v. Waller, 421 U.S. 656 (1975) 9

Hathorn v. Lovorn, 457 U.S. 255 (1982) 8, 17

LULAC v. Clements, 914 F.2d 620 (5th Cir. 1990) (en banc) 10

LULAC v. Clements, 902 F.2d 293 (5th Cir. 1990) ...4, 10

McCain v. Lybrand, 465 U.S. 236 (1984) 9

NAACP v. Hampton County Election Commission, 470 U.S. 166 (1985) 9, 12, 17

Perkins v. Matthews, 400 U.S. 379 (1971) 12, 15, 16

Udall v. Tallman, 380 U.S. 1 (1965) 12

United States v. Board of Commissioners of Sheffield, 435 U.S. 110 (1978) 9, 12

United States v. Board of Supervisors of Warren County, 429 U.S. 642 (1977) 9, 11

United States v. Texas et al., A-90-CA-1018 2

CONSTITUTION AND STATUTES

U.S. Constitution, Amendment XIII 6

U.S. Constitution, Amendment XIV 6

TABLE OF AUTHORITIES – Continued

Page

U.S. Constitution, Amendment XV 6

42 U.S.C. Sections 1983 and 1988 6

28 U.S.C. Section 1253 2

28 U.S.C. Section 2284 6

Section 2 of the Voting Rights Act, 42 U.S.C. Section 1973 10

Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c ..... *passim*

28 C.F.R. 51.25 5

28 C.F.R. 51.39 ..... 4, 5, 10, 11

Sections 7 & 7a Texas Constitution 10

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THE STATE OF TEXAS, *et al.*

Appellees.

On Appeal From The United States District Court For The Western District Of Texas

JURISDICTIONAL STATEMENT

The appellants are Mexican American and Black voters in Texas, an organization of Mexican American Attorneys and a Mexican American public interest organization in Texas. They appeal from an order of the three-judge court of the United States District Court for the Western District of Texas dated December 26, 1990, refusing to enjoin the implementation of certain state court judgeships found to be objectionable by the United States Attorney General under Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c. That same order refused to require defendants to submit certain other judgeships, even

though those judgeships became elected offices after the effective date of Section 5 of the Voting Rights Act, and the United States Attorney General determined that those judgeships should be submitted for preclearance.

OPINIONS BELOW

The 2-1 opinion and dissent of the three-judge district court dated December 26, 1990 is unpublished and is reproduced in the accompanying appendix, App. 1. This case was consolidated with *United States v. Texas et al.*, A-90-CA-1018 which was a case filed by the U.S. Government to enforce a letter of objection pursuant to Section 5 of the Voting Rights Act; the consolidation order is reproduced in the accompanying appendix, App. 41. The judgment of the court was entered on January 25, 1991 and is reproduced at App. 93.

JURISDICTION

The district court's order denying the requested injunctive relief was entered on December 26, 1990 and judgement was entered on January 25, 1991. A notice of appeal from the December 26 order was filed on January 7, 1991, App. 42, and amended on February 6, 1991, App. 95. This Court has jurisdiction of this appeal from the denial of injunctive relief by a three-judge district court under 28 U.S.C. Section 1253 and 42 U.S.C. Section 1973c.

STATUTE INVOLVED

Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c; the text of this section is reproduced at App. 44.

STATEMENT OF THE CASE

INTRODUCTION

This case involves two Texas state statutes creating state district court judgeships: S.B. 1379 and S.B. 515. These two statutes involve different facts and legal issues and will be treated differently.

The Administrative Preclearance Process and S.B. 1379:

On June 14, 1989 the Governor of the State of Texas signed into law S.B. 1379 which created certain new state district court judgeships in numerous counties throughout Texas. App. 51. Eight months later[1], on February 13, 1990 Texas submitted for preclearance S.B. 1379, pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. App. 47. On March 20, 1990, as part of the submission of S.B. 1379 and pursuant to discussions between Texas and the Department of Justice, Texas supplemented the submission with Sections 7 & 7a of Art. 5 of the Texas Constitution. A copy of the supplemental information is included at App. 59.

[1] At the trial Judge Bunton asked the attorneys for Texas why they had waited so long to submit S.B. 1379 and they stated that they had no explanation.

By letter dated April 11, 1990 the Department of Justice informed the State of Texas that it had received the supplemental information and that the new information was "necessary for a proper review of" S.B. 1379. It informed Texas that the new deadline for its review of S.B. 1379 was May 22, 1990. App. 68. The extension of the deadline is required by the administrative procedures for Section 5 of the Voting Rights Act, 28 C.F.R. 51.39[2]

By letter dated May 16, 1990, six days before the new May 22 deadline, Texas again supplemented the submission of S.B. 1379 as follows:

> "This letter is to request that you consider our submission of Senate Bill 1379 in accordance with the Fifth Circuit's holding in *LULAC*, and in conjunction with the en banc opinion that will be issued." App. 70.[3]

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[2] 28 C.F.R. 51.39 provides: **Supplementary submission.** (a) When a submitting authority provides documents and written information materially supplementing a submission (or a request for reconsideration of an objection) for evaluation as if part of its original submission, or, before the expiration of the 60-day period, makes a second submission such that the two submissions cannot be independently considered, the 60-day period for the original submission will be calculated from the receipt of the supplementary information or from the second submission. (b) The Attorney General will notify the submitting authority when the 60-day period for a submission is recalculated from the receipt of supplementary information or from the receipt of a second related submission. (c) Notice of the receipt of supplementary information will be given to interested parties registered under § 51.32.

[3] *LULAC* is *LULAC v. Clements* 902 F.2d 293 (5th Cir. 1990).

By letter dated May 18, 1990 the Department of Justice made it clear that the deadline had again been extended:

> "It is our understanding pursuant to a discussion between Austin Bray, an attorney on your staff, and Sandra Colemann Deputy Chief of the Voting Section, that you request that the information you provided on May 15 and May 16, 1990, supplement your submission and that you understand that this will extend the time for review under Section 5. Accordingly, [the new deadline is July 16, 1990]. See procedures for the Administration of Section 5 (28 C.F.R. 51.39)." App. 72.

By letter dated July 2, 1990, 14 days before the new July 16 deadline, the State of Texas exercised it's right to withdraw the submission:

> "Pursuant to 28 C.F.R. § 51.25, this letter is to advise you that the State of Texas is hereby withdrawing its submission of Chapter 632, Senate Bill 1379, 71 Legislature, 1989. Our records indicate that you received this submission on February 13, 1990. Prior to this withdrawal, the 60th day for your response to this submission was July 16, 1990." App. 74.[4]

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[4] 28 C.F.R. § 51.25 provides: **Withdrawal of submission.** (a) A jurisdiction may withdraw a submission at any time prior to a final decision by the Attorney General. Notice of the withdrawal of a submission must be made in writing, addressed to the Chief, Voting Section, Civil Rights Division, Department of Justice, Washington, D.C. 20530. The submission will be deemed withdrawn upon receipt of the notice. (b) Notice of withdrawals will be given to interested parties registered under § 51.32.

The Department of Justice formally acknowledged the withdrawal. App. 76.

On October 1, 1990, the State of Texas formally resubmitted its "submission of Chapter 632, Senate Bill 1379" for preclearance. App. 78.

By letters dated November 5, 1990 and November 20, 1990, well within sixty days from the resubmission date, the Attorney General objected to S.B. 1379 because the State of Texas had failed to meet its burden of proof as required by Section 5 of the Voting Rights Act. The Attorney General specifically found that "the use of the at-large election system with numbered posts and majority vote results in a clear violation of Section 2. . . . " and that the State of Texas had "not met its burden under Section 5 of showing the absence of a discriminatory purpose" in the adoption of S.B. 1379. These letters are reproduced at App. 80 and 85.

Pursuant to the letters of objection, plaintiffs, who are Black and Hispanic voters of Texas, challenged the implementation of S.B. 1379.[5] A three-judge district court was convened pursuant to 28 U.S.C. § 2284 and 42 U.S.C. § 1973c.

At the hearing on the plaintiffs' motion for summary and injunctive relief, Texas, for the first time took the

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[5] Plaintiffs also challenged the method of electing those district court judges as violative of the thirteenth, fourteenth and fifteenth amendments to the United States Constitution and 42 U.S.C. §§ 1983 and 1988. None of these claims has been decided below and none present any issue for decision in this appeal.

position that preclearance had already been secured by operation of law because the Attorney General had not objected within 60 days of the original submission date, February 13, 1990. Essentially, even though supplemental information had been submitted on several occasions and the correspondence clearly documented an understanding between Texas and the Attorney General that the deadlines had been extended pursuant to federal regulations, Texas now took the position that the supplemental information submitted was not material and thus the extension of the deadlines were invalid. A majority of the district court agreed with Texas.

In a 2-1 decision, the district court, using a non-voting rights case as authority, *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986), overruled the Attorney General's judgment that material supplemental information had been submitted by Texas and precleared S.B. 1379 by "operation of law"; the court precleared S.B. 1379 because the Attorney General had failed to object within 60 days from the original submission date. App. 10. It denied all relief to the plaintiffs.

Judge Bunton dissented. He filed his initial and supplemental dissents pointing out that supplemental information had been submitted extending the initial 60 day period, the extensions had been acknowledged by Texas without objection and that the Attorney General acted properly. App. 33-35.

The nonsubmission of S.B. 515:

S.B. 515 was enacted by the Texas legislature on May 11, 1971. It created the 200th and the 201st judicial districts with the 200th court created effective September 1,

1971 and the 201st court created effective January 1, 1973. App. 57. The Governor of Texas was authorized to appoint someone to these positions as of the effective dates of the courts and the appointee could hold office until the first elected term began.

The first general election for both of these courts was after November 1, 1972, the effective date for the preclearance requirements of Section 5 of the Voting Rights Act. The United States Attorney General took the position that on the face of the Statute, it appeared that these courts should be submitted to the Department of Justice for preclearance since Section 5 requires preclearance of all voting practices **imposed or applied** after November 1, 1972, 42 U.S.C. 1973c. App. 3.

The district court agreed with the defendants and cited *City of Lockhart v. United States*, 460 U.S. 125 (1983) for the proposition that the date of enactment rather than, as the plaintiffs argued, the date on which voters were first subjected to the voting procedure, as the appropriate date for determining applicability for Section 5. App. 5.

THE QUESTIONS ARE SUBSTANTIAL

Section 5 provides that any voting change in a covered jurisdiction such as the State of Texas may not be implemented until the jurisdiction obtains preclearance from the Attorney General or a declaratory judgment from the United States District Court for the District of Columbia stating that the change has no discriminatory purpose or effect. *Hathorn v. Lovorn*, 457 U.S. 255, 269 (1982). The questions in this case relate to the duty of a

federal district court to enforce Section 5 once a State attempts to implement voting changes to which the Attorney General has interposed an objection or requested a submission. This Court has granted probable jurisdiction in similar cases and reversed district courts that have failed to adequately enforce Section 5. *See, e.g., Blanding v. Dubose,* 454 U.S. 393 (1982); *NAACP v. Hampton County Election Commission,* 470 U.S. 166 (1985); *McCain v. Lybrand,* 465 U.S. 236 (1984); *United States v. Board of Commissioners of Sheffield,* 435 U.S. 110 (1978); *United States v. Board of Supervisors of Warren County,* 429 U.S. 642 (1977); *Connor v. Waller,* 421 U.S. 656 (1975). The Court should do the same here.

This portion of the jurisdictional statement will first discuss the district court's failure to enforce the letter of objection issued by the Attorney General. Second, it will discuss the district court's failure to require Section 5 preclearance of voting changes applied by Texas after November 1, 1972. Finally, it will suggest some remedies.

I. THE DISTRICT COURT ERRED IN DETERMINING THAT SUPPLEMENTAL INFORMATION SUPPLIED BY THE STATE OF TEXAS PURSUANT TO ITS SUBMISSION OF S.B. 1379 WAS NOT MATERIAL.

In *Blanding v. Dubose,* 454 U.S. 393 (1982), as in this case, a three judge district court failed to enforce a Section 5 objection; it determined that the Attorney General had failed to object within the 60 days by misinterpreting a "submission" as a "request for reconsideration", *Id.* at 398. This Court examined closely the correspondence

between the Attorney General and the submitting authority and noted that since the "submission" added no new changes to the election structure that had been previously objected to, the "submission" was in fact a "request for reconsideration" as interpreted by the Attorney General. It agreed with the Attorney General's interpretation and application of the federal regulations governing the preclearance process. The Court reversed the district court.

In this case, Texas submitted supplemental information twice. First, it supplemented with Sections 7 & 7a of the Texas Constitution; these Sections of the Texas Constitution provide for, among other things, terms of office, a description of judicial districts, a description of judicial district boards, and qualifications for judges. App. 63-67. Later, on May 16, 1990, Texas further supplemented the submission by requesting that the Attorney General consider the *LULAC v. Clements*, 902 F.2d 293 (5th Cir. 1990).[6] The *LULAC* decision interpreted the application of Section 2 of the Voting Rights Act to the judicial system of Texas.

Clearly, the supplemental information was material to the submission. The subject matter of the supplemental information dealt with Texas' judicial system, the very subject of S.B. 1379. In both instances the Attorney General found the supplemental information material to his analysis of S.B. 1379 and, as required by 28 C.F.R. 51.39, extended the deadline for the review process. Texas was aware of the extensions and did not object to them at the

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[6] This decision was subsequently vacated when the 5th Circuit decided to hear the case *en banc*. The *en banc* opinion is reported at 914 F.2d 620 (5th Cir. 1990).

time. The actions of the Attorney General were well within his discretion and consistent with the federal regulations. The district court was wrong in usurping the administrative process from the Attorney General and preclearing voting changes that were found violative of Section 5 of the Voting Rights Act.

Also, as in the *Blanding* decision, to allow the district court holding in this case to stand would allow a submitting authority to manipulate the submission process and frustrate the purpose of Section 5. A submitting authority could supply to the Attorney General supplemental information pursuant to 28 C.F.R. § 51.39, extend the 60-day period, agree that the extension was proper, then later come to court and claim that the supplemental information was not material and that the 60 day period had expired. *Supra* 454 U.S. at 400-401. As noted by Judge Bunton in his supplementary dissent to the district court opinion, "Texas clearly acknowledges both that its preclearance request has not been decided by the Attorney General, and that its submission of 'supplementary materials' extended the objection deadline . . . " App. 35.

Further, in deciding that certain supplemental information submitted to the Attorney General was not material to the Attorney General's analysis, the district court, in effect, encroached upon an issue that is exclusively reserved for the Attorney General and the District Court for the District of Columbia: whether a proposed change actually discriminates on account of race, *United States v. Board of Supervisors of Warren County, Mississippi*, 429 U.S. 642, 645-646, (1977). This court has made it clear that " . . . Congress expressly reserved for consideration by the District Court for the District of Columbia or the

Attorney General – the determination whether a covered change does or does not have the purpose or effect 'of denying or abridging the right to vote on account of race or color.' " 429 U.S. at 645. In deciding that supplemental information was not material, the district court, by necessity, substituted its own judgement on what material is relevant in deciding whether or not a voting change violates Section 5 of the Voting Rights Act. This issue is clearly not within the scope of the three-judge district court, *Id.*

It is well settled that courts should afford "great deference to the interpretation given [a] statute by the officers or agency charged with its administration," *Blanding, supra* 454 U.S. at 401, and that "[w]hen the construction of an administrative regulation rather than a statute is an issue, deference is even more clearly in order." *Udall v. Tallman*, 380 U.S. 1, 16 (1965). In particular, this Court has emphasized "the Attorney General's key role in the formation of the [Voting Rights] Act," and has found his construction of the Act "persuasive evidence of the original understanding, especially in light of the extensive role [he] played in drafting the statue and explaining its operation to Congress." *NAACP v. Hampton County Election Commission*, 470 U.S. 166, 178 (1985); *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110, 131 (1978); see also *Perkins v. Matthews*, 400 U.S. 379, 390-391 (1971). The court below, however, gave no weight to the Attorney General's interpretation of Section 5 and the administrative regulations governing supplemental information, but rather substituted its own judgment for that of the Attorney General.

The Attorney General's determination that material supplemental information had been received and that the deadline had been extended was neither "plainly erroneous" nor "inconsistent with [the Act or] the regulation[s]." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Texas knew about the extensions, agreed to them, was in no way prejudiced by them and objected to them only after the Attorney General interposed an objection.

Finally, another consideration is the minority community. In this case, counsel for the minority community monitored the submission of S.B. 1379 from is inception in an effort to protect their voting rights. In faithfully following the submission process, the correspondence between the Attorney General and the State of Texas made it clear that preclearance had not been secured.

The minority community filed suit after the election process began and it became evident that Texas had not yet complied with Section 5 of the Voting Rights Act. The district court's decision dismissing the plaintiffs claim places the minority community in the position of having to second guess the Attorney General's determination that supplemental information has been received and having no remedy if, later, a district court disagrees with the Attorney General. Such a situation is clearly unfair to the minority community and certainly was not intended by Congress when it enacted the Voting Rights Act.

For the reasons set forth above, it was a reasonable exercise of the Attorney General's discretion under the Act, and was fully consistent with the Act and the regulations governing its administration.

II. NEWLY CREATED ELECTED POSITIONS WHOS FIRST ELECTION OCCURRED AFTER NOVEMBER 1, 1972, MUST BE PRECLEARED BY THE ATTORNEY GENERAL PURSUANT TO SECTION 5 OF THE VOTING RIGHTS ACT.

Section 5 in express terms reaches any voting standard, practice, or procedure that is **imposed or applied** by any State or political subdivision "different from that in force or effect on November 1, 1972." (emphasis added) 42 U.S.C. 1973c. Clearly the **voting procedures** for the courts created by S.B. 515 were **applied,** for the first time, after November 1, 1972. This is why the Attorney General opined that those voting changes should be submitted for preclearance.

In the case of the 200th district court, its effective date of creation was September 1, 1971. App. 57. At that point, it was an appointed office and Charles D. Mathews was appointed by the governor on August 27, 1971. App. 88. The first general election for this court, admitted by the defendants at trial, was held after November 1, 1972. (The primaries for this office were conducted before that date, see App. 5).

In the case of the 201st district court, its effective date of creation was January 1, 1973. App. 57. At that point, it became an appointed position and David S. McAngus was appointed by the Governor on December 28, 1972. App. 89. It was not until 1974 when the first primary and general elections were conducted for this court, well after the November 1, 1972 effective date of Section 5. App. 92.

Clearly, as admitted by both parties, the first **election** where there was a determination by the voters on who would be **elected** to the 200th and the 201st district court

occurred after November 1, 1972. More to the point, the first time the minority voters of Travis County were subjected to the at-large election of office holders to the 200th and 201st district courts was after November 1, 1972.

The district court cited *City of Lockhart v. United States*, 460 U.S. 125 (1983) and *Perkins v. Matthews*, 400 U.S. 379, 394 (1971) for the proposition that date of enactment of a statute is the determinative date for coverage of the Act. This is a clear misreading of these cases. In fact, these cases make it clear that the court should look at what and when voting practices are actually **applied** by a jurisdiction and ignore the enactment date of a state statute. In *Perkins*, a state statute was passed in 1962 mandating at-large city elections. The City of Canton ignored the mandate and conducted elections by district in 1965. In 1969, Canton went to an at-large election system and claimed they did not have to preclear the change because the state statute mandating at-large elections was passed in 1962, before the 1964 coverage date of the Voting Rights Act.

The Supreme Court held that preclearance was required regardless of the enactment date of the state statute because, had the election been held November 1, 1964, Canton would have, as it did in 1965, used a single member district election system. Since that is different from at-large elections, the Act applied, regardless of the enactment date of the state statute, *supra* at 394. The *Perkins* case makes it clear that date of enactment is not the determinative date for coverage of the Voting Rights Act.

Using the *Perkins* rationale in this case, had Texas conducted state elections on November 1, 1972, both the 200th and 201st district courts would not have had elections because, at that point, neither court was an elected office. The 200th court was an appointed office, and the 201st court was not in existence until January 1, 1973 when the Governor made his appointment. The 201st court did not become an elected office until 1974.[7]

Further, as stated earlier, this Court has consistently held that the Attorney General should be accorded great deference in interpreting the Voting Rights Act, see pages 12 and 13 above. The district court gave very little weight to the Attorney General's opinion on this issue.

III. THIS COURT SHOULD REINSTATE THE ATTORNEY GENERAL'S LETTER OF OBJECTION, ORDER THAT ELECTIONS HELD PURSUANT TO S.B. 1379 BE SET ASIDE, ORDER THE SUBMISSION OF S.B. 515 TO THE ATTORNEY GENERAL FOR PRECLEARANCE AND REMAND THE CASE TO THE DISTRICT COURT FOR FURTHER RELIEF THAT MAY BE NECESSARY.

Because of the district court's erroneous holding regarding Section 5, it permitted the election and the winners to take office in certain judgeships even though the Attorney General objected under Section 5 to the

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[7] Clearly, this is the only fair way to interpret the coverage issue. If S.B. 515 authorized the creation of a new district court every two years into the future, preclearance would clearly be required everytime a new court was up for its first election.

method of electing those judgeships. In *NAACP v. Hampton County Election Commission*, 470 U.S. 166 (1985), this Court ordered the following relief:

> [I]t is appropriate in these circumstances for the District Court to enter an order allowing appellees 30 days in which to submit these changes to the Attorney General for approval. . . . If appellees *fail to seek this approval, or if approval is not forthcoming*, the results of the March, 1983 election *should be set aside*.

470 U.S. at 182-183 (emphasis added). In the present case, the State has submitted S.B. 1379 to the Attorney General for approval, and the Attorney General has objected. Under the *Hampton County* rule, elections held pursuant to S.B. 1379 and objected to by the Attorney General should be set aside. Also, the State has refused to submit S.B. 515. Again, under *Hampton County*, the district court can order the state to submit S.B. 515 to the Attorney General for preclearance.

In addition to the above remedies, the district court can determine what further remedial measures are necessary in light of the rights of minority voters under Section 5 and the interests of the State in the smooth functioning of its justice system. For example, the district court can consider in the first instance whether it is possible to hold new elections for the uncleared seats under an iterim court-ordered plan that cures the Section 5 deficiencies and permits the judgeships to remain functional. *See Hathorn v. Lovorn*, 457 U.S. 255, 270 (1982). In the meantime, of course, the State of Texas remains free to pass and preclear legislation that would cause these judgeships to be elected in a manner that satisfies the Voting Rights Act.

CONCLUSION

For the reasons stated above, the district court opinion should be summarily reversed and the Attorney General's letter of objection should be upheld.

Respectfully submitted,

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APPENDIX TABLE OF CONTENTS

Page

Opinion of the District Court, filed December 26, 1990 ..... App. 1

Dissent of Judge Bunton, filed December 26, 1990 ..... App. 17

Supplemental Dissent of Judge Bunton, filed December 27, 1990 ..... App. 29

Consolidation Order of the District Court, filed December 4, 1990 ..... App. 41

Plaintiffs Notice of Appeal ..... App. 42

Text of Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c ..... App. 44

Secretary of State Letter of Submission dated February 8, 1990 ..... App. 47

Senate Bill 1379 ..... App. 51

Senate Bill 525 ..... App. 57

Supplemental Material FAX dated March 23, 1990 ..... App. 59

Department of Justice Letter dated April 11, 1990 ..... App. 68

Supplemental Material dated May 16, 1990 ..... App. 70

Department of Justice Letter dated May 18, 1990 ..... App. 72

Withdrawal Letter dated July 2, 1990 ..... App. 74

Department of Justice Letter dated July 16, 1990 ..... App. 76

Resubmission Letter dated October 1, 1990 ..... App. 78

November 5, 1990 Section 5 objection letter ..... App. 80

APPENDIX TABLE OF CONTENTS – Continued

Page

November 20, 1990 Section 5 objection letter . . . App. 85

History of the 200th District Court . . . . . App. 88

History of the 201st District Court . . . . . App. 89

Election History of the 200th and the 201st District Courts . . . . . App. 90

Judgment of the District Court, January 25, 1991 . . . . . App. 93

Plaintiffs Amended Notice of Appeal . . . . . App. 95

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS (MABA) (Statewide), et. al., Plaintiffs,	§	
v.	§	MO-90-CA-171
THE STATE OF TEXAS, Defendant,	§	A-90-CA-1018 (Consolidated)
and	§	FILED DEC 26 1990
FAITH JOHNSON, et. al., Defendant-Intervenors.	§	
UNITED STATES OF AMERICA, Plaintiff,	§	
v.	§	
STATE OF TEXAS, et. al, Defendants.	§	

Before JERRY E. SMITH, Circuit Judge, LUCIUS D. BUNTON, III, Chief District Judge, and WALTER S. SMITH, JR., District Judge. J. SMITH and W. SMITH CONCUR. L. BUNTON CONCURS IN PART and DISSENTS IN PART.

MEMORANDUM OPINION AND ORDER

In this consolidated case we sit as a special three-judge court pursuant to section 5 of the Voting Rights Act of 1965 (the "Act"), 42 U.S.C. § 1973c. The private plaintiffs in one action (No. MO-90-CA-171) and the United States in the other (No. A-90-CA-1018) ask us to enjoin

the implementation, or continuing implementation, of certain alleged voting changes affecting the selection of state district judges in several designated counties in Texas. We conclude that as a matter of law the plaintiffs are entitled to no relief.

I.

For the sake of simplicity, we consider the challenged judgeships in two groups: (1) the Travis County judgeships and (2) the judgeships in what we will term the "other challenged counties," which include the Texas counties of Dallas, Lubbock, Tarrant, and Victoria. Our basis for denying relief differs between the two groups, as their legal status is dissimilar. As to both groups, the plaintiffs challenge the continuing implementation of county-wide voting for multiple state district judge positions within each of the subject counties. They assert that the at-large election of state district judges is in violation of section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

The United States Court of Appeals for the Fifth Circuit recently has held that section 2 does not apply to the election of judges. *See League of United Latin American Citizens Council No. 4434 v. Clements*, 914 F.2d 620, 622 (5th Cir. 1990) (en banc) (overruling *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir.), *cert. denied*, 488 U.S. 955 (1988)), *petition for cert. filed sub nom. Houston Lawyers' Ass'n v. Mattox*, 59 U.S.L.W. 3406 (U.S. Nov. 21, 1990) (No. 90-813). Based at least in part, if not entirely, upon its view that it is not bound by that decision (hereinafter "*LULAC*"), the Attorney General of the United States on November 5, 1990, interposed an objection to the implementation of

new district judgeships in the other challenged counties. The objection was interposed pursuant to the Attorney General's conclusion that the State of Texas had not carried its burden, under section 5, of showing that the new judgeships would not violate section 2.

A few days earlier, on October 26, 1990, the private plaintiffs had filed the instant complaint in No. MO-90-CA-171. They assert that the new judgeships in the other challenged counties may not be implemented because, *inter alia*, they have not been precleared, allegedly as required by section 5, by either the Attorney General or the United States District Court for the District of Columbia.

Additionally, the private plaintiffs assert that two district judgeships in Travis County have not received preclearance as required. The private plaintiffs seek an injunction proscribing all further elections in Travis County and the other challenged counties until preclearance is obtained.

Following the Attorney General's interposition of an objection as to the other challenged counties on November 5, the United States filed the instant complaint in No. A-90-CA-1018, seeking to enjoin the implementation of the asserted voting changes in the other challenged counties. The United States and the Attorney General now contend, as well, that the Travis County judgeships were subject to preclearance requirements, were not precleared, and now should be submitted for preclearance.

II.

We conclude that creation of the Travis County judgeships at issue here is not subject to the preclearance requirement of section 5. The judgeships in question are the 200th and 201st judicial district courts, which were added to Travis County by S.B. 515, which bill was signed by the governor on June 1, 1971, and became effective on August 20, 1971. The bill created the 200th judicial district court effective September 1, 1971, and the 201st effective January 1, 1973.

Section 5 was not applicable to Texas at that time, but the state became a covered jurisdiction on August 6, 1975, by operation of Pub. Law No. 94-73, the 1975 amendments to the Act. Section 204 of the enactment, 89 Stat. 402, added language to section 5 to require preclearance as to "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972.

Thus, in order to be a covered change, and electoral change in Texas must be different from one in "force or effect" as of November 1, 1972. S.B. 515 was in effect long before that date and has remained unchanged thereafter. The effective date of the law, not the dates on which the respective judgeships were first filled through appointment or election, are determinative for purposes of section 5.

At least one three-judge voting rights court in Texas has so held. In *Hereford Indep. School Dist. v. Bell*, 454 F. Supp. 143, 145 (N.D. Tex. 1978) (three-judge court), the court explained that preclearance was required for election procedures "*enacted* after November 1, 1972."

[Emphasis added.] The same conclusion was suggested by the Supreme Court in *Briscoe v. Bell*, 432 U.S. 404, 413 n. 12 (1977), which noted that as to Texas, the 1975 amendments established November 1, 1972, as "the precise date at which a coverage determination becomes effective, thereby requiring, for example, preclearance of any laws affecting voting rights *after* that date." [Emphasis added.]

The applicable test was enunciated in *City of Lockhart v. United States*, 460 U.S. 125 (1983). The Court observed that in ascertaining whether a change has a proscribed effect, "[t]he proper comparison is between the new system and the system actually in effect on November 1, 1972. . . ." *Id.* at 132. Quoting *Perkins v. Matthews*, 400 U.S. 379, 394 (1971), the *Lockhart* court noted that "'§ 5's reference to the procedure "in force or effect on November 1, 19[72]," must be taken to mean the procedure that would have been followed if the election had been held on that date.' "

Here, the "system actually in effect on November 1, 1972," included the existing 200th and 201st district courts. A judge had been gubernatorily appointed to the 200th court in August 1971, and primary elections were conducted in the spring of 1972. Although the general election was held within a few days after November 1, 1972, absentee balloting was well underway by that date. A judge was gubernatorily appointed to the 201st court in January 1973. The primary and general elections were conducted, respectively, in the spring and fall of 1974.

Under the reasoning in *Perkins*, if a hypothetical election had been conducted for the 200th and 201st courts on

November 1, 1972, it would have been conducted under the system in place prior to that date, which included the existing two courts in question. Thus, we conclude that the date of enactment, rather than the dates of the first elections for the respective two courts, is the appropriate date by which to determine applicability of section 5.

We also observe that looking to the date of enactment is consistent with the posture taken by the Attorney General concerning the questioned judgeships in the other challenged counties. In his letter of November 5, 1990, the Attorney General interposed objection to the changes effected by the *enactment* of the bill creating those courts. The Attorney General cannot have it both ways: If enactment is the operative event for purposes of the judgeships in the other challenged counties, the same must be true for the Travis County judgeships, as well. Hence, we deny all relief as to the Travis County judgeships.

III.

We conclude that creation of the questioned judgeships in the other challenged counties was precleared by operation of law, assuming *arguendo* that the creation of new judgeships such as those at issue is subject to section 5's preclearance requirement. The judgeships being challenged herein in the other challenged counties were created by S.B. 1379, which was signed by the governor on June 14, 1989, and established the judgeships effective

September 1, 1989. The bill created fifteen judgeships, which are set forth in the margin.[1]

Section 5 permits a covered jurisdiction, such as Texas, to seek preclearance of electoral changes either by filing a declaratory judgment action in the United States District Court for the District of Columbia or by submitting the changes to the Attorney General. By the specific terms of section 5, a submitted change is deemed precleared as a matter of law if "the Attorney General has not interposed an objection within sixty days after such submission."

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[1]

Court	*County(ies)*	*Challenged*
363rd	Dallas	Yes
364th	Lubbock	Yes
365th	Dimmitt, Maverick, Zavala	No
366th	Collin	No
367th	Denton	No
368th	Williamson	No
369th	Anderson, Cherokee	No
370th	Hidalgo	No
371st	Tarrant	Yes
372nd	Tarrant	Yes
373rd	Tarrant	No
374th	Tarrant	No
375th	Tarrant	No
376th	Tarrant	No
377th	Victoria	Yes

For purposes of the present request under § 5 for injunctive relief, only those judgeships marked "Yes" under the "Challenged" column are being questioned by the plaintiffs. The 373rd, 374th, 375th, and 376th courts do not exist, although nominally authorized by S.B. 1379, as the statutory conditions necessary to bring them into existence have not been met.

The Attorney General has promulgated regulations designed to implement the preclearance contemplated by section 5. *See* 28 C.F.R. ch. 1 pt. 51, "Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended." The regulations reiterate the provision in section 5 that a matter is deemed precleared if not objected to by the Attorney General within sixty days. 28 C.F.R. § 51.1(a)(2) (1990).

During the sixty-day period, the Attorney General may, *by letter*, request "any omitted information considered necessary for the evaluation of the submission." *Id.* § 51.37(a). Significantly, "[w]hen a submitting authority provides documents and written information *materially supplementing* a submission . . . , the 60-day period . . . will be calculated from the receipt of the supplementary information. . . . " *Id.* § 51.39(a) (emphasis added).

The State of Texas asserts that S.B. 1379 was precleared by operation of law in that sixty days had elapsed from its initial submission without either (1) the interposition of an objection or (2) the submission of "materially supplementing" information. We agree and, hence, deny all relief as to the judgeships in the other challenged counties.

The state submitted S.B. 1379 to the Attorney General on February 13, 1990; the sixtieth day for interposing an objection was April 16, 1990. During the period between February 13 and April 16, the state provided no additional material, with one exception.

On March 23, following a telephone conversation with an employee of the United States Department of Justice (DOJ), the state telecopied a copy of Tex. Const.

art. V, §§ 7 and 7a, to the Voting Rights Section of the Civil Rights Division of the DOJ. Each of those constitutional sections had been precleared by the Attorney General by letter dated October 1, 1985.

By letter dated April 11, the Attorney General's office notified the state that supplemental information had been received and that, consequently, the deadline for objection had been extended to May 22. The letter did not assert that the additional information constituted a *material* supplement.

Between March 23 and May 22, the state furnished no additional material, with one exception. By letter dated May 16, referencing a telephone conversation with a DOJ employee, the state, by letter to that employee, requested that she consider, in regard to the submission of S.B. 1379, the panel opinion in *LULAC*, 902 F.2d 293 (5th Cir. 1990) (declaring section 2 inapplicable to multi-member, county-wide judgeships), and the then-anticipated en banc opinion (which in fact was issued the following September).

By letter dated May 18, the Attorney General's office notified the state that by virtue of the state's May 16 letter, the deadline for objection had been extended to July 16 (the sixtieth day after May 16). Then, following the en banc oral arguments in *LULAC* that occurred on June 19, 1990, the state, by letter dated July 2, 1990, purported to withdraw its submission of S.B. 1379. Immediately following issuance of the en banc opinion in *LULAC* on September 28, 1990, the state on October 2 resubmitted S.B. 1379 to the Attorney General, requesting preclearance.

We hold that neither the telecopy of March 23, 1990, nor the letter of May 16, 1990, constitutes a material supplemental submission necessary to extend the sixty-day period provided to the Attorney General for interposing an objection. If the March 23 telecopy thus did not start the sixty-day period running anew, S.B. 1379 was precleared by operation of law on April 16, 1990. Assuming *arguendo* that the March 23 telecopy was a material supplemental submission, the sixty-day period nevertheless expired on May 22, as the letter of May 16 was not a material supplemental submission.

The assertion that the telecopying of two sections from the Texas constitution started the sixty-day period running anew is entirely without merit. Those constitutional sections were available as published legal materials in any reasonably complete law library; the DOJ does not argue that it had no easy access to the same. Moreover, the sections had been precleared by the Attorney General several years previously. They were not at issue, directly or indirectly, in the submission of S.B. 1379.

Facts are "material" if they "might affect the outcome . . . under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). There is no respect in which the submission to the Attorney General of a copy of readily available provisions, of which the Attorney General was well aware and which already had received the close scrutiny of the preclearance process, possibly could have "affected the outcome" of the submission of S.B. 1379.

Additionally, section 51.39(a) of the regulations, discussed *supra*, requires that in order to re-start the sixty-

day period, the new documents must be "materially supplementing" the initial submission. Even assuming *arguendo* that the documents here were "material," they cannot reasonably be deemed to have "supplemented" the submission of S.B. 1379. As we have observed, the Attorney General already knew of the constitutional sections, had ready access to them, and had precleared them. The mere sending of copies of them to the DOJ did not add to, or supplement, anything.

Finally, section 51.37(a) of the regulations, discussed *supra*, requires that any additional information needed by the Attorney General must be requested "by letter." It is acknowledged that the sections of the Texas constitution, if requested at all, were asked for by telephone. In summary, then, the March 23 telecopy did not trigger a new sixty-day period, and S.B. 1379 was precleared by operation of law on April 16.

Assuming *arguendo* that a new sixty-day period began running on March 23, it expired on May 22, and the state's letter of May 16 cannot be deemed a "materially supplementing" submission. The May 16 letter merely called the DOJ's attention to the pendency of the *LULAC* case. But that information did not "supplement" anything.

As of May 16, the DOJ was participating actively as amicus curiae in *LULAC*, in which oral argument was presented before the Fifth Circuit panel on April 30, with a panel opinion issued on May 11. *See LULAC*, 902 F.2d 293 (5th Cir. 1990). On May 16, the court entered its order granting rehearing en banc in *LULAC*. *See LULAC*, 902

F.2d 322, 323 (5th Cir. 1990). The DOJ participated in briefing and oral argument before the en banc court.

Thus, the DOJ was aware of, and was a part of, every phase of the *LULAC* litigation during the time when S.B. 1379 was under submission. The DOJ was undeniably cognizant of the fact that both *LULAC* and S.B. 1379 involved the question of at-large voting for district judges in Texas. A letter asking the DOJ to consider *LULAC* in reviewing S.B. 1379 thus certainly was not "material" and could not have "supplemented" any information or knowledge that the DOJ or the Attorney General already had.

Accordingly, the mere sending of the May 16 letter did not trigger a new sixty-day period under section 51.39(a). The sixty-day period, even if started anew on March 23, expired on May 22, and consequently, in the alternative, was precleared by operation of law on May 22. The purported withdrawal of the submission on July 2 had no legal effect, as by operation of law the preclearance had already occurred, and the state was free to implement the electoral changes, if any, encompassed by S.B. 1379.

Finally, as to the letter of May 16, we note that the Attorney General apparently never deemed the *LULAC* litigation material, in any event, for purposes of the preclearance of S.B. 1379. That is evident from the fact that, despite the Fifth Circuit's en banc conclusion that section 2 does not apply to the election of judges, the Attorney General, in his letter of November 5 interposing an objection to S.B. 1379, acknowledged the *LULAC* en banc opinion but declined to follow it. Instead, the November 5

letter declares that "use of the at-large election sytem [sic] with numbered posts and majority vote results in a clear violation of Section 2. . . . "

Hence, for this additional reason, the *LULAC* litigation, from the Attorney General's point of view, was not a "material" or "supplemental" submission that, under section 51.39(a), could have triggered a new sixty-day period for the interposition of objections. Therefore, S.B. 1379 has been precleared by operation of law, and thus the prerequisites for an injunction under section 5 have not been satisfied.

IV.

We close by expressing our concern at the actions taken, and the position expressed, by the Attorney General and DOJ in this matter. Texas is within the geographical jurisdiction of the Fifth Circuit. On September 28, 1990, in *LULAC*, that court, sitting en banc, declared, by a margin of 12-1, that section 2 does not apply to at-large, numbered-post, multi-member elections of district judges in Texas. By a margin of 7-6, the court declared that the election of judges, in general, is not within the ambit of section 2.

Despite this plain ruling, the Attorney General, in his letter of November 5, interposed an objection to S.B. 1379 solely on the basis of his contention that "use of the at-large election sytem [sic] with numbered posts and majority vote results in a clear violation of Section 2. . . . " During oral argument in the instant matter, the DOJ has asserted that it does not consider itself bound by the

LULAC decision, even as to electoral changes in the three states encompassing the Fifth Circuit.

This position reflects a disturbing disregard for the rule of law. The Attorney General is not merely preserving, as an advocate, an issue for possible later resolution by the Supreme Court. Instead, he has taken official action, by interposing an administrative objection, that is based solely upon a ground definitively rejected as the law in the Fifth Circuit. The DOJ participated actively in the *LULAC* litigation and now, having lost, seeks to assert its view by ignoring the law of the circuit.

The aim of the United States here is salutary – to effect the laudable goals of the Act by opposing changes that, in the view of the Attorney General, have the purpose or effect of diminishing the role of minorities in the electoral process. However, as the instant action is brought under the Act, both this court and the Attorney General are limited to the role assigned by Congress in passing the Act.

The Circuit court by which this district court is bound (absent Supreme Court directive) has declared that section 2 does not apply to the election of judges. The United States, as a litigant in this court, is bound by that determination. Likewise, it may not wield its administrative sword in this circuit in contravention of the interpretation of the Act enunciated by the Fifth Circuit (again, absent any intervening declarations by the Supreme Court).[2]

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[2] We also observe that the result of the Attorney General's position here, if allowed to prevail, is somewhat mixed. One of

(Continued on following page)

The orderly administration and enforcement of the Voting Rights Act must be based upon the rule of law, as enacted by Congress and interpreted by the courts. In our dark past, minority rights were abrogated by defiant state officials who refused to accept the rule of law, as declared by the federal courts. That era, fortunately, has passed. We merely observe that the commendable objectives of the Voting Rights Act can be achieved, as well, only through adherence to the orderly, albeit sometimes time-consuming, process of court interpretation, to which the United States, like the states and private parties, is subject.

V.

In summary, no preclearance was required for S.B. 515, and S.B. 1379 was precleared by operation of law. Hence, the requirements for injunctive relief under section 5 have not been met.[3] We deny all relief. It is so ordered.

(Continued from previous page)

the challenged judgeships involves a black female elected in 1990 in Dallas County; another challenge, in Tarrant Court, would bring about the removal from the bench of an Hispanic make who has served as a state judge for many years.

[3] *See also Hunter v. City of Monroe*, Civ. Ac. No. 90-2031 (W.D. La. Nov. 7, 1990) (three-judge court) (holding that § 5 does not apply to the mere addition of judgeships to an existing judicial structure).

/s/ J. Smith
JERRY E. SMITH
United States Circuit Judge

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
United States District Judge

BUNTON, LUCIUS D., Chief District Judge, CONCURRING IN PART AND DISSENTING IN PART.

I concur in the part of Judge Smith's opinion that the Travis County judgeships, i.e., the 200th and 201st District Courts are not subject to the preclearance requirements of Section 5. I dissent from the part of the opinion that the questioned judgeships in the other challenged counties were precleared by operation of law. This is incorrect, because it is contrary to the facts that were presented to the Court and, further, is incorrect under the law for the reasons hereinafter set forth.

This is an action pursuant to the Voting Rights Act of 1965, 42 U.S.C. 1973c as amended in 1982, 42 U.S.C. Sections 1983 and 1988, and the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States, challenging the failure of the State of Texas to preclear, pursuant to the Voting Rights Act, the creation of seven State District Judgeships in Texas.[4] This hearing is limited to consideration of the Voting Rights issue.

Section 5 of the Voting Rights Act provides that whenever a political subdivision seeks to "administer any voting qualification or prerequisite to voting, or standard,

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[4]

COURT	COUNTY
363rd	Dallas
364th	Lubbock
371st	Tarrant
372nd	Tarrant
377th	Victoria
200th	Travis
201st	Travis

practice, or procedure with respect to voting different from that in force or effect on November 1, 1972", it must obtain preclearance either from a United States District Court in the District of Columbia or the Attorney General. If preclearance is sought from the Attorney General and he tenders no objection within sixty days, the submission is precleared by operation of law.[5] Texas, as a covered jurisdiction under this section[6], must seek preclearance of electoral changes in accordance with the section's provisions.

Five of the seven challenged judgeships were created by S. B. 1379,[7] which was passed by the Texas legislature in its 1989 regular session and signed by the Governor on June 14, 1989. Texas submitted S.B. 1379 to the Attorney General for preclearance on February 13, 1990. The Attorney General's deadline for interposing an objection was April 16, 1990. On March 20th, Texas telecopied two sections of the Texas Constitution (Sections 7 and 7a of Article 5) to the Voting Rights Section of the Civil Rights Division of the Department of Justice ("DOJ") following a telephone conversation with a DOJ employee. Upon receipt of this information, the Attorney General extended the objection deadline to May 22, 1990.

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[5] *See* 42 U.S.C. §1973c.

[6] See 28 C.F.R. Pt. 51, Appendix (1990) (Texas has been a "covered jurisdiction" since September 23, 1975.

[7] The 200th and 201st District Courts in Travis County were added by S.B. No. 515, which was signed by the Governor on June 1, 1971, and became effective August 30, 1971. Section 1 of the bill created the 200th judicial district effective September 1, 1971, and the 201st effective January 1, 1973.

On May 16, 1990, Texas submitted a letter to the Attorney General requesting that its submission be considered in accordance with the Fifth Circuit's panel decision and anticipated en banc decision in *LULAC Council No. 4434 v. Clements*. Thus, the Attorney General extended the objection deadline to July 16, 1990.

After en banc arguments in *LULAC*, Texas withdrew its submission of S.B. 1379 in a letter dated July 2, 1990. Following the en banc decision in *LULAC*, Texas resubmitted S.B. 1379 on October 1, 1990.

On November 5, 1990, the Attorney General interposed its objection to Texas' voting changes promulgated by S.B. 1379, nothing that Texas failed to meet its burden of establishing that the submitted changes have neither a discriminatory purpose nor a discriminatory effect.

This Court must determine three main issues: Is Section 5 of the Voting Rights Act applicable to the contested judgeships? If so, did Texas properly obtain preclearance? Finally, if a violation of Section 5 does exist, what is the appropriate remedy?[8]

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[8] See *McCain v. LyBrand*, 465 U.S. 236, 250, n.17, 79 L.Ed.2d 271, 282, 104 S.Ct. 1037 (1984) ("The only questions in an action alleging a violation of the §5 preclearance requirements are (1) whether a change is covered by §5, (2) if the change is covered, whether §5's approval requirements have been satisfied, and (3) if the requirements have not been satisfied, what relief is appropriate."); *Lockhart v. United States*, 460 U.S. 125, 129, n. 3, 74 L.Ed.2d 863, 103 S.Ct. 998 (1983).

Does Section 5 Apply to S.B. 1379?

Yes.

Since September 23, 1975, Texas has been a "covered jurisdiction" under Section 5 of the Voting Rights Act.[9] The Act requires preclearance when a State seeks to administer any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . . ".[10] Notably, this section applies itself to all "voting", and imposes no limitation on who or what is the subject of the voting. In fact, the Supreme Court summarily affirmed two cases which found that judicial elections are submit [sic] to the requirements of Section 5.[11] although Texas argues "that Section 5 does not apply to the changes that are the subject of the plaintiffs' challenge because judicial elections in general are not covered by Section 5",[12] it goes on to add, "Texas understands that this Court is bound by the Supreme Courts summary affirmances in two cases in which these legal arguments were rejected."[13] Thus, Texas does not dispute the applicability of Section 5 in this instance; it merely argues

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[9] 28 C.F.R. Pt. 51, Appendix (1990).

[10] See 42 U.S.C. §1973(c).

[11] *Brooks v. State Board of Elections*, No. CV 288-146 (S.C.Ga. Dec. 1, 1989), *modified* (May 29 and June 25, 1990), *aff'd mem.*, Nos. 90-272 & 93-332 (U.S. October 15, 1990); *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985), *aff'd mem.*, 477 U.S. 901 (1986) ("We hold the fact that an election law deals with the election of members of the judiciary does not remove it from the ambit of section 5.")

[12] Texas's Response to Plaintiffs' Motion to Enjoin Elections for Certain Unprecleared Judgeships, p. 13.

[13] *Id.*

S.B.1379 has met the preclearance requirements contained in the section.

Did Texas properly obtain preclearance of S.B. 1379 pursuant to Section 5?

No.

Under Section 5, Texas could pursue either the two options in obtaining preclearance of voting changes: Submit its preclearance request to a District Court in the District of Columbia, or submit them to the Attorney General. Texas opted for the latter, and submitted S.B. 1379 for preclearance February 13, 1990. Under Section 5, the Attorney General had sixty days, or until April 16, 1990, to interpose an objection.

Within this period (on March 20th), Texas telecopied two sections of the Texas Constitution (Sections 7 and 7a of Article 5) to the Voting Rights Section of the Civil Rights Division of the Department of Justice. According to Section 5, submission of "additional information" extends the deadline. Thus, the new deadline became May 22, 1990.[14]

Within this new period (on May 16th), Texas submitted additional information to the Attorney General in the form of a letter requesting that its preclearance request be

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[14] On April 16, 1990, Texas received the Attorney General's letter notifying Texas that "supplemental information was received on March 23 and 28, 1990." Thus, the deadline was extended to May 22, 1990.

considered in accordance with *LULAC*.[15] This resulted in extension of the objection deadline to July 16, 1990.[16]

Prior to the July 16th deadline, Texas withdrew its submission of S.B. 1379 in a letter dated July 2, 1990. To explain This action, Texas states, "[p]rior to this withdrawal, the 60th day for your response to this submission was July 16, 1990". Texas offers as its reason for withdrawal that "[i]t is thus not certain whether the court will issue its opinion (in *LULAC*) prior to July 16, 1990." Additionally, since a jurisdiction is only permitted to withdraw a submission prior to a final decision by the Attorney General,[17] Texas' actions in requesting and accepting withdrawal affirms its understanding that preclearance had not yet been achieved. Thus, Texas clearly acknowledges both that its preclearance request has not been decided by the Attorney General, and that its submission of "additional material" extended the objection deadline to July 16, 1990. With this, Texas' first attempt at preclearance ended without a decision by the Attorney General.

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[15] On April 16, 1990, Texas received notification from the Attorney General that Texas' submission of additional information extended the objection deadline. Thus, when Texas chose to submit its second letter, it was fully aware that submission of additional materials would result in an extension of the existing deadline. Even so, Texas chose to submit the letter.

[16] In a letter dated May 18, 1990, the Attorney General notified Texas of the new July 16, 1990 deadline, stating "[w]e received additional supplemental information regarding this submission on May 15 and 16, 1990."

[17] 28 C.F.R. §51.25(a) (1990).

On October 1, 1990, Texas sent a letter to the Attorney General resubmitting[18] its application for preclearance of S.B. 1379. The language in the letter very clearly states this is a resubmission of Texas' preclearance request, thus beginning another sixty day objection deadline.

On November 5, 1990, which was well within the time frame for submission of objections, the Attorney General issued its opinion denying preclearance of S.B. 1379. Texas made no further attempts to obtain preclearance. Accordingly, it is clear that S.B. 1379 simply has not been precleared pursuant to Section 5 of the Voting Rights Act.

What Remedy is Appropriate to Achieve Section 5 Compliance for S.B. 1379?

Preclearance.

To achieve compliance with Section 5, Texas must obtain preclearance of S.B. 1379. "By the very terms of the statute, covered changes in election laws may not be put into effect until they have either been precleared by the Attorney General or approved by the United States District Court for the District of Columbia. Indeed, they are not 'effective as laws until and unless [they are] cleared

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[18] The specific wording in the letter is "This letter is to advise you that the State of Texas is hereby resubmitting its submission of Chapter 632, Senate Bill 1379, 71st Legislature, 1989." The Court sees no ambiguity in the language which would cause Texas to believe it was doing anything other than resubmitting its preclearance request, thus beginning another sixty day objection period.

pursuant to §5.' "[19] Since the Attorney General refuses preclearance, the only remaining option lies with the United States District Courts for the District of Columbia. In my opinion, since Section 5 compliance is lacking, Texas must "institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. . . . "[20] In the interests of justice, preclearance must be sought within sixty days.

This leaves open the status of the unprecleared judgeships during the pendency of this process. The United States Supreme Court considered this situation in *Berry v. Doles*, 438 U.S. 190, 57 L.Ed.2d 693 (1978). In that case, the three-judge panel found noncompliance with Section 5, enjoined further enforcement of the relevant statute, and ordered the State of Georgia to seek approval under Section 5 within thirty days. *Id.* at 192, 193. The Court stated, "If approval is obtained, the matter will be at an end." *Id.* at 193. I agree that in the interim of the preclearance process, the judges presiding in the 363rd, 364th, and 377th District Courts should continue in the operation of their courts, with full power and authority.[21]

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[19] *Haith*, supra note 7, at 414.

[20] *See* 42 U.S.C. §1973c.

[21] I commend the judges who preside over these Courts for their efforts in reducing the total caseload in their

(Continued on following page)

Since the newly elected judges to the 371st and 372nd District Courts have not yet taken the oath and initiated proceedings in those Courts, the unprecleared judgeships in Districts 371 and 372 should remain vacant until preclearance is obtained. No affirmative action to certify unprecleared judgeships is appropriate.

In rendering this opinion, I note that I in no way wish to hinder the Legislature's efforts to create additional State District Courts. In fact, I recognize the imperative need for the judgeships created by S.B. 1379. I merely ask, as I must under the law, compliance with Section 5 of the Voting Rights Act.

I write also to commend the Department of Justice and the Attorney General. I do not believe for a minute that intervening in the *LULAC v. Mattox* case before the Fifth Circuit constituted any sort of a waiver on the part of the United States to continue to seek vigorous enforcement of the Voting Rights Act. The Attorney General is not ignoring the en banc decision. He is attempting to comply with the law as the Sixth Circuit has decreed and as he perceives the Voting Rights Act should be interpreted. Certainly, the Department of Justice has more things to do than monitor each Constitutional provision of the Fifty states of the United States, each statute passed by those states, and the opinions of each district court and circuit court. All submissions in the case before this Court were relevant and material and, certainly, the State

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(Continued from previous page)

respective areas. I am fully aware that the existence of these Courts is certainly in the best interest of the public, and I in no way wish to impede the progress of State District Judges.

of Texas believed not only that preclearance had to be sought but that preclearance had not been obtained. It is inconceivable to me that the State of Texas would withdraw the submission if they thought as a matter of law or fact that the judgeships had been precleared. It is just as inconceivable to believe that the State would make a resubmission in October of 1990 if it felt that the matter had been precleared many months before. In my opinion, my two judicial brothers who sat with me on this panel are patently wrong.

At the risk of making this opinion too long, I cannot help but believe that the en banc decision in LULAC was incorrect. As a District Judge in the Fifth Circuit, I am bound by the en banc opinion, and will abide by it until such time as the Supreme Court reverses the opinion or the Congress makes changes in the Voting Rights Act.

The majority opinion here seeks to salve its conscience by pointing out that two of the judges of the courts involved are minorities. Just because one of the judges is a black female and another a Hispanic male does not make the opinion correct. I have no quarrel with either of these individuals, and am sure they are both highly qualified and competent judges. The fact remains, however, that the Voting Rights Act does not speak to those holding the office, but rather speaks to the rights of voters. The voters in the respective districts of these two judges are, in my opinion, having their rights under the Act violated.

Shakespeare, in *Sonnet 35*, reflects my feelings about the current state of the law in the Fifth Circuit when it comes to the Voting Rights Act. He said:

> Roses have thorns, and silver fountains mud;
> Clouds and eclipses stain both moon and sun;
> And loathsome canker lives in sweetest bud. All
> men make faults.

The opinion in *LULAC* is indeed a thorn in the flesh of voters. The silver fountain of Voting Rights does indeed contain mud. This stains both moon and sun and is indeed a sore on one of the sweetest rights guaranteed by our Constitution. In the opinion of this writer, the *LULAC* en banc decision is reminiscent of the infamous *Dred Scott* decision,[22] which deprived many people of their rights and led to our most unfortunate historic conflict.

I would hope that the Supreme Court of the United States will recognize this as a most important field of the law that needs their interpretation. It is hard to believe that the voters in Mississippi, Louisiana, and Texas are afforded less rights than voters in the States that are in the Sixth Circuit, i.e., Kentucky, Michigan, Ohio, and Tennessee.

If the Supreme Court does not soon give us guidance, some citizens are going to be deprived of their Constitutional and statutory voting rights.

I DISSENT.

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[22] In *Dred Scott v. Sandford*, 19 How. 393, 394, 15 L.Ed. 691 (1857) the Supreme Court stated, "The plaintiff having admitted, by his demurrer to the plea in abatement, that his ancestors were imported from Africa and sold as slaves, he is not a citizen of the state of Missouri according to the Constitution of the United States, and was not entitled to sue in that character in the Circuit Court."

SIGNED this 26th day of December, 1990.

/s/ Lucius D. Bunton
Honorable Lucius D. Bunton
Chief Judge

MO90CA171
A90CA1018
SUPPLEMENTARY DISSENT

FILED DEC 27 1990

BUNTON, LUCIUS D., Chief District Judge, CONCURRING IN PART AND DISSENTING IN PART.

I concur in the part of the majority's opinion that finds the Travis County judgeships, i.e., the 200th and 201st District Courts are not subject to the preclearance requirements of Section 5. I dissent from the part of the opinion that the questioned judgeships in the other challenged counties were precleared by operation of law. This is incorrect, because it is contrary to the facts that were presented to the Court and, further, is incorrect under the law for the reasons hereinafter set forth.

This is an action pursuant to the Voting Rights Act of 1965, 42 U.S.C. 1973c as amended in 1982, 42 U.S.C. Sections 1983 and 1988, and the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States, challenging the failure of the State of Texas to preclear, pursuant to the Voting Rights Act, the creation of seven State District Judgeships in Texas.[4] This hearing is limited to consideration of the Voting Rights issue.

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[4]

COURT	COUNTY
363rd	Dallas
364th	Lubbock
371st	Tarrant
372nd	Tarrant
377th	Victoria
200th	Travis
201st	Travis

Section 5 of the Voting Rights Act provides that whenever a political subdivision seeks to "administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972", it must obtain preclearance either from a United States District Court in the District of Columbia or the Attorney General. If preclearance is sought from the Attorney General and he tenders no objection within sixty days, the submission is precleared by operation of law.[5] However, if the submitting authority provides "supplementary information" for evaluation, the sixty day period is recalculated from receipt of the supplementary information.[6] Texas, as a covered jurisdiction under this section[7], must seek preclearance of electoral changes in accordance with the section's provisions.

Five of the seven challenged judgeships were created by S.B. 1379,[8] which was passed by the Texas legislature in its 1989 regular session and signed by the Governor on June 14, 1989. Texas submitted S.B. 1379 to the Attorney General for preclearance on February 13, 1990. The Attorney General's deadline for interposing an objection was April 16, 1990. On March 20th, Texas telecopied two

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[5] *See* 42 U.S.C. §1973c.

[6] 28 C.F.R. § 51.39(a) (1990).

[7] See 28 C.F.R. Pt. 51, Appendix (1990) (Texas has been a "covered jurisdiction" since September 23, 1975).

[8] The 200th and 201st District Courts in Travis County were added by S.B. No. 515, which was signed by the Governor on June 1, 1971, and became effective august 30, 1971. Section 1 of the bill created the 200th judicial district effective September 1, 1971, and the 201st effective January 1, 1973.

sections of the Texas Constitution (Sections 7 and 7a of Article 5) to the Voting Rights Section of the Civil Rights Division of the Department of Justice ("DOJ") following a telephone conversation with a DOJ employee. Upon receipt of this supplementary information, the Attorney General extended the objection deadline to May 22, 1990.

On May 16, 1990, Texas submitted a letter to the Attorney General requesting that its submission be considered in accordance with the Fifth Circuit's panel decision and anticipated en banc decision in *LULAC Council No. 4434 v. Clements*. Thus, the Attorney General extended the objection deadline to July 16, 1990.

After en banc arguments in *LULAC*, Texas withdrew its submission of S.B. 1379 in a letter dated July 2, 1990. Following the en banc decision in *LULAC*, Texas resubmitted S.B. 1379 on October 1, 1990.

On November 5, 1990, the Attorney General interposed its objection to Texas' voting changes promulgated by S.B. 1379, noting that Texas failed to meet its burden of establishing that the submitted changes have neither a discriminatory purpose nor a discriminatory effect.

This Court must determine three main issues: Is Section 5 of the Voting Rights Act applicable to the contested judgeships? If so, did Texas properly obtain preclearance? Finally, if a violation of Section 5 does exist, what is the appropriate remedy?[9]

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[9] See *McCain v. LyBrand*, 465 U.S. 236, 250, n.17, 79 L.Ed.2d 271, 282, 104 S.Ct. 1037 (1984) ("The only questions in an action alleging a violation of the §5 preclearance requirement are (1)

(Continued on following page)

Does Section 5 Apply to S.B. 1379?

Yes.

Since September 23, 1975, Texas has been a "covered jurisdiction" under Section 5 of the Voting Rights Act.[10] The Act requires preclearance when a State seeks to administer any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . . ".[11] Notably, this section applies itself to all "voting", and imposes no limitation on who or what is the subject of the voting. In fact, the Supreme Court summarily affirmed two cases which found that judicial elections are submit [sic] to the requirements of Section 5.[12] Although Texas argues "that Section 5 does not apply to the changes that are the subject of the plaintiffs' challenge because judicial elections in general are not covered

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whether a change is covered by §5, (2) if the change is covered, whether §5's approval requirements have been satisfied, and (3) if the requirements have not been satisfied, what relief is appropriate."); *Lockhart v. United States*, 460 U.S. 125, 129, n. 3, 74 L.Ed.2d 863, 103 S.Ct 998 (1983).

[10] 28 C.F.R. Pt. 51, Appendix (1990).

[11] See 42 U.S.C. §1973(c).

[12] *Brooks v. State Board of Elections*, No. CV 288-146 (S.D. Ga. Dec. 1, 1989), *modified* (May 29 and June 25, 1990), *aff'd mem.*, Nos. 90-272 & 93-332 (U.S. October 15, 1990); *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985), *aff'd mem.*, 477 U.S. 901 (1986) ("We hold the fact that an election law deals with the election of members of the judiciary does not remove it from the ambit of section 5.")

by Section 5",[13] it goes on to add, "Texas understands that this Court is bound by the Supreme Courts summary affirmances in two cases in which these legal arguments were rejected."[14] Thus, Texas does not dispute the applicability of Section 5 in this instance; it merely argues S.B. 1379 has met the preclearance requirements contained in the section.

Did Texas properly obtain preclearance of S.B. 1379 pursuant to Section 5?

No.

Under Section 5, Texas could pursue either of two options in obtaining preclearance of voting changes: Submit its preclearance request to a District Court in the District of Columbia, or submit them to the Attorney General. Texas opted for the latter, and submitted S.B. 1379 for preclearance February 13, 1990. Accordingly, the Attorney General had sixty days, or until April 16, 1990, to interpose an objection.

Within this period (on March 20th), Texas telecopied two sections of the Texas constitution (Sections 7 and 7a of Article 5) to the Voting Rights Section of the Civil Rights Division of the Department of Justice. According to 28 C.F.R. § 51.39, submission of "suplementary

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[13] Texas's Response to Plaintiffs' Motion to Enjoin Elections for Certain Unprecleared Judgeships, p. 13.

[14] *Id.*

information" extends the deadline. Thus, the new deadline became May 22, 1990.[15]

Within this new period (on May 16th), Texas submitted supplementary information to the Attorney General in the form of a letter requesting that its preclearance request be considered in accordance with *LULAC*.[16] This resulted in extension of the objection deadline to July 16, 1990.[17]

Prior to the July 16th deadline, Texas withdrew its submission of S.B. 1379 in a letter dated July 2, 1990. To explain this action, Texas states, "[p]rior to this withdrawal, the 60th day for your response to this submission was July 16, 1990". Texas offers as its reason for withdrawal that "[i]t is thus not certain whether the court will issue its opinion (in *LULAC*) prior to July 16, 1990." Additionally, since a jurisdiction is only permitted to withdraw a submission prior to a final decision by the Attorney General,[18] Texas' actions in requesting and

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[15] On April 16, 1990, Texas received the Attorney General's letter notifying Texas that "supplemental information was received on March 23 and 28, 1990." Thus, the deadline was extended to May 22, 1990.

[16] On April 16, 1990, Texas received notification from the Attorney General that Texas' submission of supplemental information extended the objection deadline. Thus, when Texas chose to submit its second letter, it was fully aware that submission of supplemental materials would result in an extension of the existing deadline. Even so, Texas chose to submit the letter.

[17] In a letter dated May 18, 1990, the Attorney General notified Texas of the new July 16, 1990 deadline, stating "[w]e received additional supplemental information regarding this submission on May 15 and 16, 1990."

[18] 28 C.F.R. §51.25(a) (1990).

accepting withdrawal affirms its understanding that preclearance had not yet been achieved. Thus, Texas clearly acknowledges both that its preclearance request has not been decided by the Attorney General, and that its submission of "supplementary materials" extended the objection deadline to July 16, 1990 with this, Texas' first attempt at preclearance ended without a decision by the Attorney General.

On October 1, 1990, Texas sent a letter to the Attorney General resubmitting[19] its application for preclearance of S.B. 1379. The language in the letter very clearly states this is a resubmission of Texas' preclearance request, thus beginning another sixty day objection deadline.[20]

On November 5, 1990, which was well within the time frame for submission of objections, the Attorney General issued its opinion denying preclearance of S.B. 1379. Texas made no further attempts to obtain preclearance. Accordingly, it is clear that S.B. 1379 simply has not been precleared pursuant to Section 5 of the Voting Rights Act.

What Remedy is Appropriate to Achieve Section 5 Compliance for S.B. 1379?

Preclearance.

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[19] The specific wording in the letter is "This letter is to advise you that the State of Texas is hereby resubmitting its submission of Chapter 632, Senate Bill 1379, 71st legislature, 1989." The Court sees no ambiguity in the language which would cause Texas to believe it was doing anything other than resubmitting its preclearance request, thus beginning another sixty day objection period.

[20] *See* 28 U.S.C. §51.39 (1990).

To achieve compliance with Section 5, Texas must obtain preclearance of S.B. 1379. "By the very terms of the statute, covered changes in election laws may not be put into effect until they have either been precleared by the Attorney General or approved by the United States District Court for the District of Columbia. Indeed, they are not 'effective as laws until and unless [they are] cleared pursuant to §5.' "[21] Since the Attorney General refuses preclearance, the only remaining option lies with the United States District Courts for the District of Columbia. In my opinion, since Section 5 compliance is lacking, Texas must "institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . . ."[22] In the interests of justice, preclearance must be sought within sixty days.

This leave open the status of the unprecleared judgeships during the pendency of this process. The United States Supreme Court considered this situation in *Berry v. Doles*, 438 U.S. 190, 57 L.Ed.2d 693 (1978). In that case, the three-judge panel found noncompliance with Section 5, enjoined further enforcement of the relevant statute, and ordered the State of Georgia to seek approval under Section 5 within thirty days. *Id.* at 192, 193. The Court stated, "If approval is obtained, the matter will be at an end." *Id.* at 193. I agree that in the interim of the preclearance process, the judges presiding in the 363rd,

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[21] *Haith*, supra note 7, at 414.

[22] *See* 42 U.S.C. § 1973c.

364th, and 377th District Courts should continue in the operation of their courts, with full power and authority.[23] Since the newly elected judges to the 371st and 372nd District Courts have not yet taken the oath and initiated proceedings in those Courts, the unprecleared judgeships in Districts 371 and 372 should remain vacant until preclearance is obtained. No affirmative action to certify unprecleared judgeships is appropriate.

In rendering this opinion, I note that I in no way wish to hinder the Legislature's efforts to create additional State District Courts. In fact, I recognize the imperative need for the judgeships created by S.B. 1379. I merely ask, as I must under the law, compliance with Section 5 of the Voting Rights Act.

I write also to commend the Department of Justice and the Attorney General. I do not believe for a minute that intervening in the *LULAC* case before the Fifth Circuit constituted any sort of a waiver on the part of the United States to continue to seek vigorous enforcement of the Voting Rights Act. The Attorney General is not ignoring the en banc decision. He is attempting to comply with the law as the Sixth Circuit has decreed and as he perceives the Voting Rights Act should be interpreted. Certainly, the Department of Justice has more things to do than monitor each Constitutional provision of the fifty states of the United States, each statute passed by those

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[23] I commend the judges who preside over these Courts for their efforts in reducing the total caseload in their respective areas. I am fully aware that the existence of these Courts is certainly in the best interest of the public, and I in no way wish to impede the progress of State District Judges.

states, and the opinions of each district court and circuit court. All submissions in the case before this Court were relevant and material and, certainly, the State of Texas believed not only that preclearance had to be sought but that preclearance had not been obtained. It is inconceivable to me that the State of Texas would withdraw the submission if they thought as a matter of law or fact that the judgeships had been precleared. It is just as inconceivable to believe that the State would make a resubmission in October of 1990 if it felt that the matter had been precleared many months before. In my opinion, my two judicial brothers who sat with me on this panel are patently wrong.

At the risk of making this opinion too long, I cannot help but believe that the en banc decision in *LULAC* was incorrect. As a District Judge in the Fifth Circuit, I am bound by the en banc opinion, and will abide by it until such time as the Supreme Court reverses the opinion or the Congress makes changes in the Voting Rights Act.

The majority opinion here seeks to salve its conscience by pointing out that two of the judges of the courts involved are minorities. Just because one of the judges is a black female and another a Hispanic male does not make the opinion correct. I have no quarrel with either of these individuals, and am sure they are both highly qualified and competent judges. The fact remains, however, that the Voting Rights Act does not speak to those holding the office, but rather speaks to the rights of voters. The voters in the respective districts of these two judges are, in my opinion, having their rights under the Act violated.

Shakespeare, in *Sonnet* 35, reflects my feelings about the current state of the law in the Fifth Circuit when it comes to the Voting Rights Act. He said:

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The opinion in *LULAC* is indeed a thorn in the flesh of voters. The silver fountain of Voting Rights does indeed contain mud. This stains both moon and sun and is indeed a sore on one of the sweetest rights guaranteed by our Constitution. In the opinion of this writer, the *LULAC* en banc decision is reminiscent of the infamous *Dred Scott* decision,[24] which deprived many people of their rights and led to our most unfortunate historic conflict.

I would hope that the Supreme Court of the United States will recognize this as a most important field of the law that needs their interpretation. It is hard to believe that the voters in Mississippi, Louisiana, and Texas are afforded less rights than voters in the States that are in the Sixth Circuit, i.e., Kentucky, Michigan, Ohio, and Tennessee.

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[24] In *Dred Scott v. Sandford*, 19 How. 393, 394, 15 L.Ed. 691 (1857) the Supreme Court stated, "The plaintiff having admitted, by his demurrer to the plea in abatement, that his ancestors were imported from Africa and sold as slaves, he is not a citizen of the state of Missouri according to the Constitution of the United States, and was not entitled to sue in that character in the Circuit Court."

If the Supreme Court does not soon give us guidance, some citizens are going to be deprived of their Constitutional and statutory voting rights.

I DISSENT.

SIGNED this 26th day of December, 1990.

/s/ Lucius D. Bunton
HONORABLE LUCIUS D. BUNTON
CHIEF JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS, et al.,	)	
Plaintiffs,	)	MO-90-CA-171
v.	)	FILED
THE STATE OF TEXAS,	)	DEC 04 1990
Defendant.	)	

ORDER

BEFORE THIS COURT is the Plaintiff's Motion in *United States v. Texas, et al.*, A-90-CA-1018, to consolidate it with the above-captioned cause. After due consideration, the Court finds the motion contains merit. Accordingly,

IT IS ORDERED MO-90-CA-171 and A-90-CA-1018 are consolidated under cause number MO-90-CA-171.

SIGNED this 4th day of December, 1990.

/s/ Lucius D. Bunton
HONORABLE
LUCIUS D. BUNTON
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS (MABA) (Statewide), et. al.	§	CIVIL ACTION #MO-90-CA-171
Plaintiffs,	§	
vs.	§	FILED JAN 07 1991
THE STATE OF TEXAS	§	
Defendant	§	

PLAINTIFFS' NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT OF THE THREE JUDGE DECISION PURSUANT TO 42 USC 1973c

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Notice is hereby given that Plaintiffs-Appellants Mexican American Bar Association (MABA) et. al., hereby appeal to the United States Supreme Court the three judges decision of December 26, 1990.

Respectfully submitted,

DATED: January 4, 1991

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CERTIFICATE OF SERVICE

This is to certify that a copy of Plaintiffs' Notice of Appeal has been sent by First Class Mail to the Attorney General for the State of Texas, the United States Department of Justice and Counsel for the Intervenors on this 4th day of January, 1991.

/s/ Rolando L. Rios
Rolando L. Rios
Attorney for Plaintiffs

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of

denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with

the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Pub.L. 89-110, Title I, § 5, Aug. 6, 1965, 79 Stat. 439, redesignated and amended Pub.L. 91-285, §§ 2, 5, June 22, 1970, 84 Stat. 314, 315; Pub.L. 94-73, Title II, §§ 204, 206, Title IV, § 405, Aug. 6, 1975, 89 Stat. 402, 405.

CAUSE NO. MO-90-CA-171
EXHIBIT 5 of Plaintiffs

Office of the
SECRETARY OF STATE

George S. Bayoud, Jr.
SECRETARY OF STATE

February 8, 1990

Assistant Attorney General
U.S. Department of Justice
Voting Section
P.O. Box 66128
Washington, D.C. 20035-6128

RE: Submission under Section 5, Voting Rights Act, of Senate Bill 1379, 71st Legislature, 1989.

Dear Sir:

Enclosed is a certified copy of Senate Bill 1379, submitted in compliance with Section 5 of the Voting Rights Act of 1965, as amended (42 U.S.C.A. § 1973c [West Supp. 1989]).

The authority responsible for the passage of the Act was the Texas Legislature. This Act was adopted pursuant to the provisions of Tex. Const. art. III, § 30. The procedure for the adoption of the change is not subject to preclearance. This Act was passed by the Texas Senate on May 22, 1989, and passed by the House of Representatives of Texas, with amendments, on May 27, 1989. The Senate concurred in the House amendments on May 28, 1989. The Act was signed by Governor William P. Clements, Jr. on June 14, 1989. The Act took effect on September 1, 1989. All language in the Act is new language.

The purpose of Senate Bill 1379 is to create certain new district courts to relieve the overcrowding of the dockets of the existing district courts in the various counties in which the new district courts will have jurisdiction.

Section 1 of the Act, effective September 1, 1989, amends the Texas Government Code by adding new Sections 24.508 through 24.515. Section 24.508 creates the 363rd District Court of Dallas County. Section 24.509 creates the 364th District Court of Lubbock County. Section 24.510 creates the 365th District Court of Dimmit, Maverick, and Zavala Counties. Section 24.511 creates the 366th District Court of Collin County. Section 24.512 creates the 367th District Court of Denton County. Section 24.513 creates the 368th District Court of Williamson County. Section 24.514 creates the 369th District Court of Anderson and Cherokee Counties. Section 24.515 creates the 370th District Court of Hidalgo County.

Section 2 of the Act, effective September 1, 1990, amends the Texas Government Code by adding new Sections 24.516 and 24.517, which create the 371st and 372nd District Courts of Tarrant County, respectively.

The vacancies that will be created when the District Court judgeships set forth in Sections 1 and 2 of the Act take effect will initially be filled by appointment of the Governor (pursuant to Article IV, Section12, of the Texas Constitution), and the judgeships in all of those courts will appear on the 1990 primary and general election ballots. The person elected will begin a full four-year term on January 1, 1991, in accordance with Article V, Section 7, of the Texas Constitution.

Section 3 of the Act amends the Texas Government Code by adding new Sections 24.518, 24.519, 24.520, and 24.521, which create the 373rd, 374th, 375th, and 376th District Courts of Tarrant Court, respectively. Section 3 takes effect on September 1, 1991, but only if: (1) Senate Bill 1694 of the 71st Legislature (1989) becomes law, and (2) the voters of Tarrant County vote to approve creation of the Tarrant County Crime Control District and adoption of a local sales and use tax prior to September 1, 1991. Senate Bill 1694 became law on June 14, 1989, and was precleared by you on November 6, 1989. The procedures for the election creating the Tarrant County Crime Control District and adoption of the sales and use tax are set forth in Article 3 of the Senate Bill 1694.

Section 4 of the Act amends the Texas Government Code by adding a new Section 24.522 which creates the 377th District Court of Victoria County. This court is created on the date on which funding is available either: (1) through legislative appropriation; (2) through the provisions of Chapter 317 of the Texas Government Code; or (3) by the Victoria County Commissioners Court. Section 5 of the Act made an appropriation in an amount necessary to create the 377th District Court of Victoria County pursuant to the mechanism described in new Section 24.522(b)(1) of the Texas Government Code. This court was, therefore, created on September 1, 1989 (the commencement of the 1990-1991 General Appropriations Act biennium). The vacancy created by the new court will be filled by appointment of the Governor (pursuant to Article IV, Section 12, of the Texas Constitution), and the judgeship will appear on the 1990 primary and general election ballots. The person elected will begin a full four-

year term on January 1, 1991, in accordance with Article V, Section 7, of the Texas Constitution.

The prior law amended by this Act, the Texas Government Code, adopted in 1985, is not subject to preclearance because that Code was a nonsubstantive recodification of existing law.

The provisions of Senate Bill 1379 do not affect members of racial or language minority groups differently from the way they affect the general public. For further information regarding the effect of this bill on minorities, contact:

Mr. Pete Perez	Judge Mary Ellen Hicks
200 West Belknap	100 East Weatherford
Fort Worth, TX 76196	Fort Worth, TX 76196
(817) 334-1426	(817) 334-1613

The provisions of this Act have not been implemented. There is no past or pending litigation involving Senate Bill 1379 or the changes that it would authorize.

If you have any questions or need additional information, please contact Austin Bray, Assistant General Counsel, Election Division, at (512) 463-5650.

Very truly yours,

/s/ Tom Harrison
Tom Harrison
Special Assistant for Elections

TH/AB/senate/im

CAUSE NO. MO-90-CA-171
EXHIBIT 3 of Plaintiffs

(SEAL)

The State of Texas
Secretary of State

I, GEORGE S. BAYOUD, JR., Secretary of State of the State of Texas, DO HEREBY CERTIFY that the attached is a TRUE AND CORRECT copy of Senate Bill 1379, passed by the 71st Legislature, Regular Session, 1989, as signed by the Governor on June 14, 1989, and as filed in the office on June 15, 1989.

IN TESTIMONY WHEREOF, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in the City of Austin, this 25th day of June, 1989.

(SEAL)

/s/ George S. Bayoud Jr.
Secretary of State

AN ACT

relating to the creation of judicial districts; making an appropriation.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Effective September 1, 1989, Subchapter C, Chapter 24, Government Code, is amended by adding Sections 24.508 through 24.515 to read as follows:

Sec. 24.508. 363RD JUDICIAL DISTRICT (DALLAS COUNTY). (a) The 363rd Judicial District is composed of Dallas County.

(b) The 363rd District Court shall give preference to criminal cases.

Sec. 24.509. 364TH JUDICIAL DISTRICT (LUBBOCK COUNTY). The 364th Judicial District is composed of Lubbock County.

Sec. 24.510. 365TH JUDICIAL DISTRICT (DIMMIT, MAVERICK, AND ZAVALA COUNTIES). The 365th Judicial District is composed of Dimmit, Maverick, and Zavala counties.

Sec. 24.511. 366TH JUDICIAL DISTRICT (COLLIN COUNTY). The 366th Judicial District is composed of Collin County.

Sec. 24.512. 367TH JUDICIAL DISTRICT (DENTON COUNTY). The 376th Judicial District is composed of Denton County.

Sec. 24.513. 368TH JUDICIAL DISTRICT (WILLIAMSON COUNTY). The 368th Judicial District is composed of Williamson County.

Sec. 24.514. 369TH JUDICIAL DISTRICT (ANDERSON AND CHEROKEE COUNTIES). The 369th Judicial District is composed of Anderson and Cherokee Counties.

Sec. 24.515. 370TH JUDICIAL DISTRICT (HIDALGO COUNTY). The 370th Judicial District is composed of Hidalgo County.

SECTION 2. Effective September 1, 1990, Subchapter C, Chapter 24, Government Code, is amended by adding Sections 24.516 and 24.517 to read as follows:

Sec. 24.516. 371ST JUDICIAL DISTRICT (TARRANT COUNTY). (a) The 371st Judicial District is composed of Tarrant County.

(b) The 371st District Court shall give preference to criminal cases.

Sec. 24.517. 372ND JUDICIAL DISTRICT (TARRANT COUNTY). (a) The 372nd Judicial District is composed of Tarrant County.

(b) The 372nd District County shall give preference to criminal cases.

SECTION 3. (a) Subchapter C, Chapter 24, Government Code, is amended by adding Sections 24.518 through 24.521 to read as follows:

Sec. 24.518. 373RD JUDICIAL DISTRICT (TARRANT COUNTY). (a) The 373rd Judicial District is composed of Tarrant County.

(b) The 373rd District Court shall give preference to criminal cases.

Sec. 24.519. 374TH JUDICIAL DISTRICT (TARRANT COUNTY). (a) The 374th Judicial District is composed of Tarrant County.

(b) The 374th District Court shall give preference to criminal cases.

Sec. 24.520. 375TH JUDICIAL DISTRICT (TARRANT COUNTY). (a) The 375th Judicial District is composed of Tarrant County.

(b) The 375th District Court shall give preference to criminal cases.

Sec. 24.521. 376TH JUDICIAL DISTRICT (TARRANT COUNTY). (a) The 376th Judicial District is composed of Tarrant County.

(b) The 376th District Court shall give preference to criminal cases.

(b) The board of the Tarrant County crime control district shall reimburse the state for the costs of salaries of judges and other court personnel and payments for retirement plans and other employee benefits for courts created under this section.

(c) This section takes effect September 1, 1991, but only if:

(1) S.B. No. 1694, 71st Legislature, Regular Session, 1989, is enacted and becomes law; and

(2) the voters of Tarrant County vote to approve creation of the county crime control district and adoption of the proposed local sales and use tax before that date for that district.

SECTION 4. (a) Subchapter C, Chapter 24, Government Code, is amended by adding Section 24.522 to read as follows:

Sec. 24.522. 377TH JUDICIAL DISTRICT (VICTORIA COUNTY). (a) The 377th Judicial District is composed of Victoria County.

(b) The 377th Judicial District shall give preference to criminal cases.

(b) This court is created on the date on which funding is available:

(1) through legislative appropriation; or

(2) through the provisions of Chapter 317, Government Code; or

(3) by the Victoria County Commissioners Court to cover judicial salary and all necessary court expenses, until necessary state funding is obtained.

SECTION 5. There is appropriated to the judiciary section of the comptroller's department, out of the General Revenue Fund, the amount necessary to provide funding for the judicial districts created by this Act in the same amounts provided for existing judicial districts by S.B. No. 222, the General Appropriations Act, for the 1990-1991 biennium.

SECTION 6. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

/s/ W P Hobby
President of the Senate

/s/ Gil Lewis
Speaker of the House

I hereby certify that S.B. No. 1379 passed the Senate on May 22, 1989, by a viva-voce vote; and that the Senate concurred in House amendments on May 28, 1989, by a

viva-voce vote; passed subject to the provisions of Article III, Section 49a, of the Constitution of Texas.

/s/ Betty King
Secretary of the Senate

I hereby certify that S.B. No. 1379 passed the House, with amendments, on May 27, 1989, by a non-record vote; passed subject to the provisions of Article III, Section 49a, of the Constitution of Texas.

/s/ Betty Murray
Chief Clerk of the House

Approved:

6-14-89
Date

/s/ W.P. Clements
Governor

I, Bob Bullock, Comptroller of Public Accounts, do hereby certify that the amounts appropriated in the herein S.B. No. 1379, Regular Session, 71st Legislature, are within the amount estimated to be available in the affected fund.
Certified June 6, 1989.

/s/ illegible
Comptroller of Public Accounts

3:30 p.m.
JUNE 1 1989
/s/ illegible
illegible

CAUSE NO. MO-90-CA-171
EXHIBIT 14 OF PLAINTIFF

JUDICIAL DISTRICTS – 200TH
AND 201ST DISTRICTS – CREATION

CHAPTER 525

S. B. NO.515

An Act amending Subchapter C, Chapter 23, Acts of the 61st Legislature, 2nd called Session, 1969, Judicial Districts Act of 1969 (Article 199a, Vernon's Texas Civil Statutes), by adding Section 3.029 providing for the creation of the 200th and 201st Judicial Districts to be composed of the County of Travis; and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. Subchapter C, Chapter 23, Acts of the 61st Legislature, 2nd Called Session, 1969, is amended by the addition[67] thereto of Section 3.029 which shall read as follows:

"Sec. 3.029. (a) The 200th and 201st Judicial Districts, each composed of the County of Travis, are hereby created.

"(b) The 200th Judicial District is created effective September 1, 1971.

"(c) The 201st Judicial District is created effective January 1, 1973."

Sec. 2. The importance of this legislation and the crowded condition of the calenders in both Houses create an emergency and an imperative public necessity that the

---

[67] Vernon's Ann.Civ.St. art. 199a. § 3.029.

Constitutional Rule requiring bills to be read on three several days in each House be suspended, and the Rule is hereby suspended.

Passed the Senate on May 11, 1971, by a viva voce vote; passed the House on May 29, 1971, by a non-record vote.

Approved June 1, 1971.

Effective Aug. 30, 1971, 90 days after date of adjournment.

GOVERNMENT EXHIBIT I
MO-90-CA-07

(SEAL)
UNITED STATES OF AMERICA

DEPARTMENT OF JUSTICE

December 6, 1990

I hereby certify that the annexed paper is a true copy of the original record which is in the official custody of the Department of Justice, to wit: Telefacsimile dated March 23, 1990 from Austin Bray, Assistant General Counsel, Elections Division, State of Texas to Carla Markim, an Equal Opportunity Specialist in Voting Section, U.S. Department of Justice.

In witness whereof, I have hereunto set my hand and caused the seal of the Department of Justice to be affixed on the day and year first above written.

/s/ Shirley Lloyd
Shirley Lloyd
Deputy Executive Officer
Civil Rights Division
Washington, D.C. 20530

(SEAL)

(SEAL)

Office of the Secretary of State

George S. Bayoud, Jr.
Secretary of State

Elections Division
Telecopier Cover Sheet

Date: 3/23/90 Time Sent: 2:20 PM.

TO: (Name) Ms. Carla Markin

(Agency/Company) D.O.J. – Voting Rts.

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IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL Austin Bray AT (512) 463-5650. THANK YOU.

CONSTITUTION OF THE STATE OF TEXAS 1876
Adopted February 15, 1876

Article — Page

PREAMBLE.

1. BILL OF RIGHTS.....1
2. THE POWERS OF GOVERNMENT.....6
3. LEGISLATIVE DEPARTMENT.....7
4. EXECUTIVE DEPARTMENT.....50
5. JUDICIAL DEPARTMENT.....57
6. SUFFRAGE.....74
7. EDUCATION.....76
8. TAXATION AND REVENUE.....91
9. COUNTIES.....104
10. RAILROADS.....114
11. MUNICIPAL CORPORATIONS.....115
12. PRIVATE CORPORATIONS.....118
13. SPANISH AND MEXICAN LAND TITLES (Repealed, Aug. 5, 1969.).....119
14. PUBLIC LANDS AND LAND OFFICE.....120
15. IMPEACHMENT.....121
16. GENERAL PROVISIONS.....123
17. MODE OF AMENDING THE CONSTITUTION OF THIS STATE.....145

* * *

procedendo, prohibition, and certiorari. The Court and the Judges thereof shall have the power to issue such other writs as may be necessary to protect its jurisdiction or enforce its judgments. The court shall have the power upon affidavit or otherwise to ascertain such matters of fact as may be necessary to the exercise of its jurisdiction.

The Court of Criminal Appeals may sit for the transaction of business at any time during the year and each term shall begin and end with each calendar year. The Court of Criminal Appeals shall appoint a clerk of the court who shall give bond in such manner as is now or may hereafter be required by law, and who shall hold his office for a term of four years unless sooner removed by the court for good cause entered of record on the minutes of said court.

The Clerk of the Court of Criminal Appeals who may be in office at the time when this Amendment takes effect shall continue in office for the term of his appointment. (As amended Nov. 8, 1966, Nov. 8, 1977, and Nov. 4, 1980.)

Sec. 6. COURTS OF APPEALS; TRANSFER OF CASES; TERMS OF JUDGES. The state shall be divided into courts of appeals districts, with each district having a Chief Justice, two or more other Justices, and such other officials as may be provided by law. The Justices shall have the qualifications prescribed for Justices of the Supreme Court. The Court of Appeals may sit in sections as authorized by law. The concurrence of a majority of the judges sitting in a section is necessary to decide a case. Said Court of Appeals shall have appellate jurisdiction co-extensive with the limits of their respective districts,

which shall extend to all cases of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law. Provided, that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error. Said courts shall have such other jurisdiction, original and appellate, as may be prescribed by law.

Each of said Courts of Appeals shall hold its sessions at a place in its district to be designated by the Legislature, and at such time as may be prescribed by law. Said Justices shall be elected by the qualified voters of their respective districts at a general election, for a term of six years and shall receive for their services the sum provided by law. Each Court of Appeals shall appoint a clerk in the same manner as the clerk of the Supreme Court which clerk shall receive such compensation as may be fixed by law.

All constitutional and statutory references to the Courts of Civil Appeals shall be construed to mean the Courts of Appeals. (As amended Aug. 11, 1891, Nov. 7, 1978, Nov. 4, 1980, and Nov. 5, 1985.)

Sec. 7. JUDICIAL DISTRICTS; DISTRICT JUDGES; TERMS OR SESSIONS; ABSENCE, DISABILITY OR DISQUALIFICATION OF JUDGE. The State shall be divided into judicial districts with each district having one or more Judges as may be provided by law or by this Constitution. Each district judge shall be elected by the qualified voters at a General Election and shall be a citizen of the United States and of this State, who is licensed to practice law in this State and has been a practicing lawyer

or a Judge of a Court in this State, or both combined, for four (4) years next preceding his election, who has resided in the district in which he was elected for two (2) years next preceding his election, and who shall reside in his district during his term of office and hold his office for the period of four (4) years, and who shall receive for his services an annual salary to be fixed by the Legislature. The Court shall conduct its proceedings at the county seat of the county in which the case is pending, except as otherwise provided by law. He shall hold the regular terms of his Court at the County Seat of each County in his district in such manner as may be prescribed by law. The Legislature shall have power by General or Special Laws to make such provisions concerning the terms or sessions of each Court as it may deem necessary.

The Legislature shall also provide for the holding of District Court when the Judge thereof is absent, or is from any cause disabled or disqualified from presiding. (As amended Nov. 6, 1949, and Nov. 5, 1985.)

Sec. 7a. JUDICIAL DISTRICTS BOARD; REAPPORTIONMENT OF JUDICIAL DISTRICTS. (a) The Judicial Districts Board is created to reapportion the judicial districts authorized by Article V, Section 7, of this constitution.

(b) The membership of the board consists of the Chief Justice of the Texas Supreme Court who serves as chairman, the presiding judge of the Texas Court of Criminal Appeals, the presiding judge of each of the administrative judicial districts of the state, the president of the Texas Judicial Council, and one person who is licensed to

practice law in this state appointed by the governor with the advice and consent of the senate for a term of four years. In the event of a vacancy in the appointed membership, the vacancy is filled for the unexpired term in the same manner as the original appointment.

(c) A majority of the total membership of the board constitutes a quorum for the transaction of business. The adoption of a reapportionment order requires a majority vote of the total membership of the board.

(d) The reapportionment powers of the board shall be exercised in the interims between regular sessions of the legislature, except that a reapportionment may not be ordered by the board during an interim immediately following a regular session of the legislature in which a valid and subsisting statewide apportionment of judicial districts is enacted by the legislature. The board has other powers and duties as provided by the legislature and shall exercise its powers under the policies, rules, standards, and conditions, not inconsistent with this section, that the legislature provides.

(e) Unless the legislature enacts a statewide reapportionment of the judicial districts following each federal decennial census, the board shall convene not later than the first Monday of June of the third year following the year in which the federal decennial census is taken to make a statewide reapportionment of the districts. The board shall complete its work on the reapportionment and file its order with the secretary of state not later than August 31 of the same year. If the Judicial Districts Board fails to make a statewide apportionment by that (illegible) Legislative Redistricting Board established by Article

III, Section (illegible) constitution shall make a statewide reapportionment of the judicial districts not later than the 150th day after the final day for the Judicial Districts Board to make the reapportionment.

(f) In addition to the statewide reapportionment the board may reapportion the judicial districts of the state as the necessity for reapportionment appears by redesignating in one or more reapportionment orders, the county or counties that comprise the specific judicial districts affected by those reapportionment orders. In modifying any judicial district, no county having a population as large or larger than the population of the judicial district being reapportioned shall be added to the judicial district.

(g) Except as provided by Subsection (i) of this section, this section does not limit the power of the legislature to reapportion the judicial districts of the state, to increase the number of judicial districts, or to provide for consequent matters on reapportionment. The legislature may provide for the effect of a reapportionment made by the board on pending cases or the transfer of pending cases, for jurisdiction of a county court where county court jurisdiction has been vested by law in a district court affected by the reapportionment, for terms of the courts upon existing officers and their duties, and for all other matters affected by the reapportionment. The legislature may delegate any of these powers to the board. The legislature shall provide for the necessary expenses of the board.

(h) Any judicial reapportionment order adopted by the board must be approved by a record vote of the

majority of the membership of both the senate and house of representatives before such order can become effective and binding.

(j) The legislature, the Judicial Districts Board, or the Legislative Redistricting Board may not redistrict the judicial districts to provide for any judicial district smaller in size than an entire county except as provided by this section. Judicial districts small in size than the entire county may be created subsequent to a general election where a majority of the persons voting on the proposition adopt the proposition "to allow the division of ___ County into judicial districts composed of parts of ___ County." No redistricting plan may be proposed or adopted by the legislature, the Judicial Districts Board, or the Legislative Redistricting Board in anticipation of a future action by the voters of any county. (Added Nov. 5, 1985.)

Sec. 8. JURISDICTION OF DISTRICT COURT. District Court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on

* * *

JRD:GS:CM:lrj
DJ 166-012-3
Z7619
AA374-388

April 11, 1990

Mr. Tom Harrison
Special Assistant for Elections
Elections Division
P. O. Box 12060
Austin, Texas 78711-2060

Dear Mr. Harrison:

This refers to Chapter 632, S.B. No. 1379 (1989), which provides for the creation of fifteen additional judicial districts and the implementation schedule for the State of Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your initial submission on February 13, 1990; supplemental information was received on March 23 and 28, 1990.

The information received on March 23, 1990 is necessary for a proper review of the instant changes under Section 5. Accordingly, by May 22, 1990, we will either make a final determination or request from you any specific items of additional information necessary to complete our review of your submission under Section 5. See

the Procedures for the Administration of Section 5 (28 C.F.R. 51.39).

Sincerely,

John R. Dunne
Assistant Attorney General
Civil Rights Division

By:

Barry H. Weinberg
Acting Chief, Voting Section

cc: Public File

CAUSE NO. MO-90-CA-171
EXHIBIT 7 OF PLAINTIFFS

Office of the
SECRETARY OF STATE

George S. Bayoud, Jr.
SECRETARY OF STATE

May 16, 1990

Ms. Sandra Coleman
Deputy Chief, Voting Section
U.S. Department of Justice
P.O. Box 66128
Washington, D.C. 20035-6128

Re: Submission under Section 5, Voting Rights Act, of Senate Bill 1379, Chapter 632, 71st Legislature, 1989.

Dear Ms. Coleman:

Reference is made to your telephone conversation of today with Mr. Austin Bray of my staff. In that conversation, you stated that the Fifth Circuit has granted a motion for rehearing en banc of its decision in *League of United Latin American Citizens Council No. 4434 v. Clements*, No. 90-8014 (5th Cir. May 11, 1990) ("*LULAC*").

This letter is to request that you consider our submission of Senate Bill 1379 in accordance with the Fifth Circuit's holding in *LULAC*, and in conjunction with the en banc opinion that will be issued.

Than [sic] you for your attention to my letter, and please feel free to contact me at (512/463-9871) or Mr. Bray at

(512/463-9861) should you have any further questions or comments in this matter.

Sincerely,

/s/ Tom Harrison
Tom Harrison
Special Assistant for Elections

TH/AB/senate/mt

CAUSE NO. MO-90-CA-171
EXHIBIT 8 OF PLAINTIFFS

JRD:GS:CM:lrj
DJ 166-012-3
Z7619
AA374-388

MAY 18 1990

Mr. Tom Harrison
Special Assistant for Elections
Elections Division
P. O. Box 12060
Austin, Texas 78711-2060

Dear Mr. Harrison:

This refers to Chapter 632, S.B. No. 1379 (1989), which provides for the creation of fifteen additional judicial districts and the implementation schedule for the State of Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received additional supplemental information regarding this submission on May 15 and 16, 1990.

It is our understanding pursuant to a discussion between Austin Bray, an attorney on your staff, and Sandra Coleman, Deputy Chief of the Voting Section, that you request that the information you provided on May 15 and 16, 1990, supplement your submission and that you understand that this will extend the time for review under Section 5. Accordingly, by July 16, 1990, we will either make a final determination or request from you any specific items of additional information necessary to

complete our review of your submission. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.39).

Sincerely,

John R. Dunne
Assistant Attorney General
Civil Rights Division

By:

Barry H. Weinberg
Acting Chief, Voting Section

cc: Public File

CAUSE NO MO-90-CA-171
EXHIBIT 9 OF PLAINTIFFS

Office of the
SECRETARY OF STATE

George S. Bayoud, Jr.
SECRETARY OF STATE

July 2, 1990

Mr. Barry Weinberg
Acting Chief, Voting Section
U.S. Department of Justice
P.O. Box 66128
Washington, D.C. 20035-6128

Re: Withdrawal of submission under Section 5, Voting Rights Act, of Chapter 632, Senate Bill 1379, 71st Legislature, 1989.

Dear Mr. Weinberg:

Pursuant to 28 C.F.R. § 51.25 (1987), this letter is to advise you that the State of Texas is hereby withdrawing its submission of Chapter 632, Senate Bill 1379, 71st Legislature, 1989. Our records indicate that you received this submission on February 13, 1990.

Prior to this withdrawal, the 60th day for your response to this submission was July 16, 1990. As you are aware, the U.S. Court of Appeals for the Fifth Circuit heard oral arguments en banc on June 19, 1990, in the case of *League of United Latin American Citizens Council No. 4434 v. Clements*, No. 90-8014 (5th Cir., *argued en banc*, June 19, 1990). It is thus not certain whether the court will issue its opinion prior to July 16, 1990. Accordingly, we believe it is in the best interest of both the Justice Department and the State of Texas for us to withdraw this submission at this time.

Thank you for your attention to my letter, and please feel free to contact me at (512) 463-9871 should you have any further questions or comments in this matter.

Sincerely,

/s/ Tom Harrison
Tom Harrison
Special Assistant for Elections

TH:ab:jm

CAUSE NO. MO-90-CA-171
EXHIBIT 10 OF PLAINTIFFS

JRD:GS:CM:gmh
DJ 166-012-3
Z7619
AA374-388

July 16, 1990

Tom Harrison, Esq.
Special Assistant for Elections
Elections Division
P.O. Box 12060
Austin, Texas 78711-2060

Dear Mr. Harrison:

This refers to Chapter 632, S.B. No. 1379 (1989), which provides for the creation of fifteen additional judicial districts and the implementation schedule for the State of Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your initial submission on February 13, 1990; supplemental information was received on March 23, 28, and May 15, 1990.

On July 2, 1990, we received your letter of the same date withdrawing the instant submission. Accordingly, no determination by the Attorney General is necessary with regard to these matters. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.25). Should you

elect to resubmit this act at a later date it will not be necessary to resubmit material previously provided.

Sincerely,

John R. Dunne
Assistant Attorney General
Civil Rights Division

By:

Barry H. Weinberg
Acting Chief, Voting Section

cc: Public File

CAUSE NO. MO-90-CA-171
EXHIBIT 11 OF PLAINTIFF

Office of the
SECRETARY OF STATE

George S. Bayoud, Jr.
SECRETARY OF STATE

October 1, 1990

Mr. J. Gerald Hebert
Acting Chief, Voting Section
U.S. Department of Justice
P.O. Box 66128
Washington, D.C. 20035-6128

Re: Resubmission under Section 5, Voting Rights Act, of Chapter 632, Senate Bill 1379, 71st Legislature, 1989.

Your File Nos.: DJ 166-012-3
Z7619
AA374-388

EXPEDITED CONSIDERATION REQUESTED

Dear Mr. Hebert:

Reference is made to my telephone conversation of this date with Ms. Sandra Coleman of your staff and to your office's letter to me of July 16, 1990, which stated "Should you elect to resubmit this act at a later date it will not be necessary to resubmit material previously provided."

This letter is to advise you that the State of Texas is hereby resubmitting its submission of Chapter 632, Senate Bill 1379, 71st Legislature, 1989. We would request, pursuant to 28 C.F.R. § 51.34 (1987), that our resubmission be given expedited consideration.

We would also request that you consider our resubmission of Senate Bill 1379 in accordance with the Fifth Circuit's recent holding in *League of United Latin American*

Citizens Council No. 4434 v. Clements, No. 90-8014 (5th Cir. Sept. 28, 1990) (en banc).

Thank you for your attention to my letter, and please feel free to contact me at (512) 463-9871 or toll-free at 1-800-252-8683 should you have any further questions or comments in this matter.

Sincerely,

/s/ Tom Harrison
Tom Harrison
Special Assistant for Elections

TH/AB/ket

CAUSE NO. MO-90-CA-171
EXHIBIT 12 OF PLAINTIFFS

U.S. Department of Justice
Civil Rights Division

Office of the Assistant Attorney General
Washington, D.C. 20530

NOV 5 1990

Mr. Tom Harrison
Special Assistant for Elections
Elections Division
P. O. Box 12060
Austin, Texas 12060

Dear Mr. Harrison:

This refers to Chapter 632, S.B. No. 1379 (1989), which provides for the creation of fifteen additional judicial districts and the implementation schedule for the State of Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission on October 2, 1990.

We have given careful consideration to the information in your submission, including all information contained in your earlier submission of Chapter 632, which was withdrawn by the state pending a decision by the court *en banc* in *League of United Latin American Citizens v. Clements*, No. 90-8014 (5th Cir. Sept. 28, 1990) and we have considered the information in that opinion, as well as prior court opinions in that case. In addition, we have considered information from the Census, along with comments and information from other sources.

The changes consist of the establishment of fifteen additional district court judgeships, denominated as separate Judicial Districts. Each judgeship is elected at large in the area of the court's jurisdiction, which consists of one or more counties. Each judgeship is subject to the general requirement in Texas law that nomination for such position requires the obtaining of a majority of the vote in a political primary. Thirteen of these judgeships will have the same geographic jurisdiction as previously existing judgeships. In these cases, the election of judgeships by Judicial District operates as a numbered post requirement eliminating any possibility of effective single-shot voting.

Our review of the history of the numbered post feature in Texas elections indicates that its adoption and continued maintenance over the years appears calculated to place an additional limitation on the ability of minority voters to participate equally in the political process and elect candidates of their choice. In that regard, we note that it is commonly understood that numbered posts along with other features such as the use of a majority-vote requirement in the context of an at-large election system, have had a discriminatory impact on racial and ethnic minorities in those areas where minorities are a significant percentage of the population. Numerous federal court decisions have chronicled instances where these features have been adopted in Texas for clearly discriminatory motives, and where their use has produced the intended discriminatory effects. In addition, review of our records shows that the Attorney General has had to interpose objection under Section 5 on forty-one occasions to the adoption of numbered posts and on

twenty-six occasions to the adoption of a majority-vote requirement by various Texas jurisdictions.

A review of more recent materials shows that it is commonly understood among Texas legislators that the discriminatory impact of these features is present in the election of judges. Indeed, the legislative session which produced Chapter 632 (1989) included an address by the Chief Justice of the Texas Supreme Court and legislative committee discussions in which the discriminatory impact of these features was acknowledged. It appears that the proposed method of electing the judicial positions presently before us, which incorporates the very features understood to be discriminatory, took the form it did primarily because of the inability of legislators to reach a consensus regarding an alternative method of selecting judges that would be fair to racial and ethnic minorities.

Accordingly, with regard to the additional judgeships in Dallas, Lubbock, and Tarrant Counties in particular, the evidence clearly indicates that the at-large method of election, even considered in isolation from the numbered post and majority-vote features, produces a discriminatory result proscribed under Section 2 of the Voting Rights Act, 42 U.S.C. 1973c.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. See *Georgia v. United States*, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5 (28 C.F.R. 51.52). In addition, our guidelines provide that a submitted change may not be precleared if

its implementation would lead to a clear violation of Section 2 of the Act. See 28 C.F.R. 51.55. Because we cannot conclude, as we must under the Voting Rights Act, that your burden has been sustained in this instance, and because our view is that use of the at-large election system with numbered posts and majority vote results in a clear violation of Section 2, I must, on behalf of the Attorney General, interpose an objection to the voting changes occasioned by Chapter 632, S.B. No. 1379 (1989) and the implementation schedule for those districts.

In reaching this decision, we are not unmindful of the recent decision of the Fifth Circuit Court of Appeals in *League of United Latin American Citizens v. Clements*, No. 90-8014 (Sept. 28, 1990) ("*LULAC*") (*en banc*) which held that the Section 2 results standard is not applicable to judicial elections. The *LULAC* court, however, expressly recognized that "Seciton 5 of the Act applies to state judicial elections" (Slip. op. at 20) and until this matter is clarified further by the courts we see no basis for altering our Section 5 procedural requirements insofar as they relate to Section 2.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. In addition, you may request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the changes to which we have objected continue to be legally unenforceable and should not be

implemented in the November 6, 1990, election. *Clark v. Roemer,* No. A-327 (U.S. Nov. 2, 1990) (copy attached). See also 28 C.F.R. 51.10 and 51.45.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Texas plans to take concerning this matter. If you have any questions, you should call George Schneider (202-514-8696), Attorney in the Voting Section.

Sincerely,

/s/ John R. Dunne
John R. Dunne
Assistant Attorney General
Civil Rights Division

JRD:GS:PM:lrj
DJ 166-012-3
AK742-743
AL623-636

NOV 20 1990

Mr. Tom Harrison
Special Assistant for Elections
Elections Division
P. O. Box 12060
Austin, Texas 78711-2060

Dear Mr. Harrison:

This refers to our letter of November 5, 1990, in which the Attorney General interposed an objection under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, to Chapter 632, S.B. No. 1379 (1989), which provides for the creation of fifteen additional elected judgeships and the implementation schedule for the State of Texas. Since that time it has come to our attention that our determination in that regard may need clarification so that state authorities will have a clearer basis upon which to conform their actions to the requirements of Section 5.

As you know, Chapter 632 created or authorized the creation of fifteen judgeships in ten of the distinct geographical districts used for the election of judges in Texas. The Attorney General's determination was made with respect to the statute as a whole but focused on certain elements of the electoral scheme which raised the concerns which led to our interposing the objection. Of course, our findings with respect to the purpose and effect of a particular voting feature well may vary depending on the demographic and historical context in which the features's implementation relative to given

positions must be viewed. Thus, our consideration of each of the new judgeships contained in Chapter 632 in the light of these factors and in the context of existing racially polarized voting, along with the use of designated post and majority vote features, led us to conclude that the state had not met its burden under Section 5 of showing the absence of a discriminatory purpose with regard to a number of the new judgeships involved, namely, those in Dallas, Lubbock, Tarrant, and Victoria counties (i.e., Judicial Districts 363-364, and 371-377). In addition, we concluded that, even aside from the designated post and majority-vote features, the at-large election method for the additional judgeships in Dallas, Lubbock, and Tarrant Counties, produced discriminatory results proscribed by Section 2 of the Voting Rights Act, 42 U.S.C. 1973c, and our earlier letter expressly noted that these judgeships were not entitled to preclearance for this additional reason.

Consequently, while our letter does say, in broad terms, that the Attorney General's objection was interposed to "the voting changes occasioned by Chapter 632," the concerns that led to our objection involved only the additional judgeships noted above. Of course, it is within the province of state authorities to decide whether, under state law, the other provisions of Chapter 632 may be enforced in view of the Attorney General's decision, but we wish to make clear our view that there is no Section 5 bar to enforcement of the additional judgeships in Dimmit, Maverick, Zavala, Collin, Denton, Williamson, Anderson, Cherokee, and Hidalgo Counties (i.e., Judicial Districts 365-370).

If you have any questions regarding this matter, please call George Schneider (202-514-8696), Attorney in the Voting Section.

Sincerely,

John R. Dunne
Assistant Attorney General
Civil Rights Division

DEFENDANT'S EXHIBIT 16

(Seal of Texas)

The State of Texas

Secretary of State

I, GEORGE S. BAYOUD, JR., Secretary of State of the State of Texas, DO HEREBY CERTIFY that the attached are TRUE AND CORRECT copies of;

1. Governor's Appointment Letter Dated August 27, 1971

2. Oath of Office Dated September 1, 1971

3. June 29, 1972 Senate Confirmation Notice

for Charles D. Mathews, Judge of the 200th Judicial District of Texas, as on file with this office.

IN TESTIMONY WHEREOF, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in the City of Austin, this 5th day of December, 1990.

/s/ George S. Bayoud, Jr.
Secretary of State

(Seal of Texas)

DEFENDANT'S EXHIBIT 17

(Seal of Texas)

The State of Texas

Secretary of State

I, GEORGE S. BAYOUD, JR., Secretary of State of the State of Texas, DO HEREBY CERTIFY that the attached are TRUE AND CORRECT copies of;

1. Governor's Appointment Letter Dated December 28, 1972

2. Oath of Office Dated January 1, 1973

3. March 22, 1973 Senate Confirmation Notice

for David S. McAngus, Judge of the 201st Judicial District of Texas, as on file with this office.

IN TESTIMONY WHEREOF, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in the City of Austin, this 5th day of December, 1990.

/s/ George S. Bayoud, Jr.
Secretary of State

(Seal of Texas)

DEFENDANT'S EXHIBIT 15

THE STATE OF TEXAS

Secretary of State

I, GEORGE S. BAYOUD, JR., Secretary of State of Texas, do hereby certify that the attached document contains true and correct returns for the primary and general elections held for the 200th and 201st District Courts in Travis County, Texas from 1972 and 1974, respectively.

IN TESTIMONY WHEREOF, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in the City of Austin, this
5th *day of* December , *A.D. 19* 90 .

/s/ George S. Bayoud, Jr.
Secretary of State

(Seal of Texas)

ELECTION RETURNS FOR THE 200th AND 201st DISTRICT COURTS

(*) = Incumbent appointee

NOTE: No Republican candidate for either judgeship has ever run in the primary or general elections.

200th DISTRICT COURT

Primary Election (Democratic)

1972 – Charles Mathews (*) – 60,068
J.H. "Buck" Smith – 23,416

1976 – Charles Mathews – 48,636

1980 – Charles Mathews – 30,285

1984 – Paul Davis – 36,056

1988 – Paul Davis – 50,589

General Election

Charles Mathews – 89,544

Charles Mathews – 101,266

Charles Mathews – 99,932

Paul Davis – 127,983

Paul Davis – 152,321

201st DISTRICT COURT

Primary Election (Democratic)

1974 –	Jerry Dellana	– 36,398
	David McAngus (*)	– 25,451
1978 –	Jerry Dellana	– 47,476
1982 –	Jerry Dellana	– 36,482
1986 –	Jerry Dellana	– 31,819
1990 –	Jerry Dellana	– 45,124

General Election

Jerry Dellana	– 56,395
Jerry Dellana	– 61,220
Jerry Dellana	– 85,944
Jerry Dellana	– 101,947
Jerry Dellana	– 128,924

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS, et al., Plaintiffs, v. STATE OF TEXAS, Defendant, and FAITH JOHNSON, et al., Defendant-Intervenors.	Civil Action No. MO-90-CA-171
	FILED JAN 25 1991
	(Consolidated Cases)
UNITED STATES OF AMERICA, Plaintiff, v. STATE OF TEXAS; et al, Defendants.	Civil Action No. A-90-CA-1018

JUDGMENT

This cause, along with *Mexican American Bar Association of Texas v. State of Texas*, C.A. No. MO-90-CA-171 (W.D. Tex.), came for an evidentiary hearing pursuant to Section 5 of the Voting Rights Act, as amended, 42 U.S.C. 1973c, on December 12, 1990, and the issues having been duly tried, and this Court having issued its Memorandum Opinion and Order on December 26, 1990, denying all

relief requested by plaintiffs under Section 5 of the Voting Rights Act;

It is hereby ORDERED, ADJUDGED, and DECREED that, pursuant to Rule 58, Federal Rules of Civil Procedure, JUDGMENT under Section 5 of the Voting Rights Act is entered for defendant State of Texas and against plaintiffs United States of America and Mexican American Bar Association of Texas, et al.

ENTERED this 25th day of January, 1991.

FOR THE THREE-JUDGE COURT

/s/ Lucius D. Bunton
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS (MABA) (Statewide), et.al. Plaintiffs,	§	CIVIL ACTION #MO-90-CA-171
vs.	§	
THE STATE OF TEXAS Defendant	§	

PLAINTIFFS' AMENDED NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT OF THE THREE JUDGE DECISION PURSUANT TO 42 USC 1973c

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Notice is hereby given that Plaintiffs-Appellants Mexican American Bar Association (MABA) et. al., hereby appeal to the United States Supreme Court the three judges decision of December 26, 1990 and the judgement entered on January 25, 1991.

Respectfully submitted,

DATED: February 7, 1991

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Attorney for Christina Moreno

By: /s/ Rolando L. Rios
ROLANDO L. RIOS
ATTORNEY FOR PLAINTIFFS
State Bar No. 16935900

OF COUNSEL:

THE MEXICAN AMERICAN LEGAL
DEFENSE AND EDUCATIONAL FUND
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San Antonio, Texas 78205
(512) 224-5476

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February, 1991, I served a copy of the United States' Amended Notice of Appeal by first class mail, postage prepaid, to the following counsel:

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